

# TRANSCRIPT OF RECORD.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920

No. 105

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PERE MARQUETTE RAILWAY COMPANY, PETITIONER,

vs.

J. F. FRENCH & COMPANY.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MICHIGAN.

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PETITION FOR CERTIORARI FILED MAY 18, 1919.

CERTIORARI AND RETURN FILED JUNE 22, 1919.

(27,115)

(27,115)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 369.

PERE MARQUETTE RAILWAY COMPANY, PETITIONER,

*vs.*

J. F. FRENCH & COMPANY.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MICHIGAN.

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No. 28489.

Parties:

J. F. FRENCH AND COMPANY, Composed of J. F. French and John Wallace, Plaintiff,

vs.

PERE MARQUETTE RAILWAY COMPANY, Defendant and Appellant.

(Pltf.'s Att'ys:) Hall & Gillard.

(Def't.'s Att'ys:) Norris, McPherson, Harrington & Waer.

Error to Kent.

Date.

1918.

Aug. 8. Præcipe filed and writ issued ret. Sept. 7, 1918.

" 12. Proof of notice of Writ filed.

" 21. Note of argument filed.

" 22. Return filed.

Oct. 15. Argued and submitted.

1919.

Apr. 3. Affirmed with costs.

" 11. Remittitur to court below.

STATE OF MICHIGAN:

The Supreme Court, October Term, 1918.

No. 28489.

J. F. FRENCH & Co., Composed of Jay F. French and John Wallace, Plaintiff and Appellee,

vs.

PERE MARQUETTE RAILWAY COMPANY, Defendant and Appellant.

Error to the Circuit Court for the County of Kent.

Hon. Willis B. Perkins, Circuit Judge.

Ostrander, Bird, Moore, Steere, Brooke, Fellows, Stone, Kuhn.

RECORD.

Norris, McPherson, Harrington & Waer, Grand Rapids, Mich., Attorneys for Defendant and Appellant.

Parker, Shields & Brown, Detroit, Mich., Of Counsel.  
Hall & Gillard, Grand Rapids, Mich., Attorneys for Plaintiff and Appellee.

Received Sep. 12, 1918. Jay Mertz, Clerk Supreme Court.

1

*Declaration.*

(Filed Jan. 26, 1918.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

J. F. FRENCH & Co., Composed of Jay F. French and John Wallace,  
Plaintiff,

vs.

PERE MARQUETTE RAILWAY COMPANY, Defendant.

*First Count. Assumpsit.*

The plaintiff says:

1. That the defendant and its connecting carriers were on the date hereinafter mentioned common carriers of goods from Bailey, Michigan, to Louisville, Kentucky.

2. That on the 3d day of November, 1917, the plaintiff delivered to the defendant at Bailey, Michigan, 45,000 pounds of potatoes in sneks, loaded in N. Y. C. car #151473.

3. That the defendant then and there delivered to the said plaintiff an order bill of lading by the terms of which said potatoes were consigned to the order of J. F. French & Company; destination, Louisville, State of Kentucky; notify Marshall & Kelsey, c-o Captain Bernard, Commissary, Camp Zachary Taylor, Kentucky, via C. C. C. & St. L.; said bill of lading bore the notation "allow inspection". A true copy of said bill of lading is attached hereto, marked exhibit "A" and made a part hereof.

2 4. The defendant agreed together with its connecting carriers, as such common carriers, to carry said goods safely from Bailey, Michigan, to Louisville, Kentucky, for hire and to allow said Marshall & Kelsey to inspect the potatoes in said car only while in the possession of the defendant or its connecting carriers at Louisville, Kentucky, and to deliver said carload of potatoes to Marshall & Kelsey only at Louisville, Kentucky, and then to make such delivery only upon the production to the defendant, or its connecting carriers at Louisville, Kentucky, by Marshall & Kelsey of the original order bill of lading, properly endorsed, and the payment by Marshall & Kelsey of the charges of the carrier for transporting the potatoes from Bailey, Michigan, to Louisville, Kentucky.

5. That the defendant and its connecting carriers did not carry said goods safely nor make delivery of them as they had agreed to do, but caused or permitted said goods to be *dis-delivered* in the following respect:

The defendant and its connecting carriers on, to wit, November 12th, 1917, without requiring an inspection of the goods at Louisville by Marshall & Kelsey only, and without requiring the production of the original bill of lading, properly endorsed by Marshall & Kelsey at Louisville, Ky., and without requiring the delivery to them at Louisville, Kentucky, of the original order bill of lading properly endorsed, delivered said carload of potatoes to another railroad company, not a connecting carrier of the said defendant, and allowed said potatoes to be taken by said other railroad company from Louisville, Kentucky, to an entirely different station or place.

6. On the 6th day of December, 1917, the plaintiff was notified that said carload of potatoes was at a place other than Louisville, on the lines of a railroad company other than the defendant and its connecting carriers unclaimed.

7. The potatoes were of a perishable nature and had then deteriorated in value by reason of the wrongful acts of the defendant and its connecting carriers aforesaid, and the market price thereof had substantially declined by reason of the unlawful and wrongful acts of the said defendant and its connecting carriers as above set forth, and would further deteriorate in value and in price if they were not promptly handled, therefore the plaintiff without waiving any of its rights, or waiving any of the wrongful or unlawful acts committed by the defendant and its connecting carriers, undertook to dispose of said carload of potatoes for the benefit of all concerned, in order to make the loss thereon as light as possible.

8. There was no market for these potatoes at the place to which the defendant and its connecting carriers had wrongfully and unlawfully allowed them to be carried, and in order to dispose of them at all it was necessary to take said potatoes to some other place.

9. The plaintiff thereupon requested the said defendant to move said potatoes to Memphis, Tennessee, so that they could dispose of the same. As a condition precedent the defendant demanded that the plaintiff deliver to it the original order bill of lading which it had issued to the plaintiff at Bailey, Michigan, and the defendant thereupon delivered to the plaintiff in place thereof an order bill of lading whereby said goods were consigned to the order of J. F. French & Company; destination, Memphis, State of Tennessee; notify McKnight & Hill at the same place; which bill of lading was issued in exchange for the bill of lading issued at Bailey, Michigan, on the 3rd day of November by the defendant. A true copy of said bill of lading is hereto attached, marked exhibit "B" and made a part hereof.

10. At the time said potatoes were delivered to the defendant at Bailey on November 3d, they had been sold by the said plaintiff at \$2.63 a cwt., or \$1,183.50, less freight \$96.75, making a net amount due plaintiff \$1,086.75.

4      11. The carload of potatoes did not reach Memphis until, to wit, December 19th, 1917, and when it did arrive there were only 39,150 pounds of potatoes in said car, which were sold at \$1.90 per hundred, or brought a total amount of \$743.85. By reason of the wrongful and unlawful acts of said defendant and its connecting carriers as above set forth, said defendant and its connecting carriers assessed demurrage charges of \$62.00; freight charges of \$232.51; a reconsigning charge of \$5.00; a war tax of \$6.98 and a switching charge of \$2.00 against said car. By reason of the same wrongful and unlawful acts of the said defendant and its connecting carriers, plaintiff was compelled to and did pay \$16.40 for labor in resorting the potatoes in said car and a brokerage fee of \$7.50 for disposing of the potatoes therein. Plaintiff was also compelled to and did expend large sums of money, to wit, \$150.00 in and about telegraphing, telephoning, and the expenses of sending a man to look after the potatoes in said car in order to dispose of the same to the best advantage, whereby plaintiff has sustained a loss of \$825.20 by reason of the wrongful and unlawful acts of the said defendant and its connecting carriers as aforesaid.

12. The plaintiff claims that it is entitled to recover the entire loss which it has sustained in this connection from the above named defendant as initial carrier, under Sec. 20 of the Interstate Commerce Act, with the amendments thereto.

Wherefore the plaintiff claims a judgment for the sum of \$1000.00.

HALL, GILLARD & TEMPLE,  
*Attorneys for Plaintiff.*

*Plea.*

(Filed March 12, 1918.)

STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

J. F. FRENCH & Co., Composed of Jay F. French and John Wallace,  
Plaintiff,

VS.

PERE MARQUETTE RAILWAY COMPANY, Defendant,

NOW comes the above named defendant by its attorneys Norris, McPherson, Harrington & Waer, and demands a trial of the matters set forth in the plaintiff's declaration.

Yours, etc.,

NORRIS, McPHERSON, HARRINGTON &  
WAER,

*Attorneys for Defendant.*

PARKER, SHIELDS & BROWN,

*Of Counsel for Defendant.*

1. Please take notice, that under the General Issue above pleaded the defendant will give in evidence and insist in its defense that on, to wit, November 12, 1917, the car of potatoes referred to in plaintiff's declaration was delivered to Messrs. Marshall & Kelsey, the persons named in the bill of lading under which said car was moved, upon the production and surrender by said Marshall & Kinsey of the original order bill of lading, endorsed in blank by the consignees,

6 the taking up of said bill of lading and the delivery of the car therefor all being done without any information or notice on the part of the delivering carriers that the said Marshall & Kelsey were not lawfully entitled to the possession of said car.

You will further take notice, that under the General Issue above pleaded said defendant will give in evidence and insist in its defense that on, to wit, December 8, 1917, when it issued the bill of lading attached to plaintiff's declaration and marked Plaintiff's Exhibit "B", it issued said bill of lading to the said plaintiff at its request in order to enable said plaintiff to ship said car from Dumesnil, Kentucky, to Memphis, Tennessee, without knowledge or notice that the car of potatoes covered thereby had already been delivered as hereinbefore stated, upon the production and surrender of the original bill of lading endorsed in blank.

Yours, etc.,

NORRIS, McPHERSON, HARRINGTON &  
WAER,

*Attorneys for Defendant.*

PARKER, SHIELDS & BROWN,

*Of Counsel for Defendant.*

*Bill of Exceptions.*

(Filed Aug. 8, 1918.)

## STATE OF MICHIGAN:

The Circuit Court for the County of Kent.

J. F. FRENCH & Co., Composed of Jay F. French and John Wallace,  
Plaintiff,

VS.

PERE MARQUETTE RAILWAY COMPANY, Defendant.

The issue joined between the parties in this cause came on for trial before the Honorable Willis B. Perkins, Circuit Judge, and a jury duly impaneled and sworn; plaintiff being represented by Messrs. Hall, Gillard & Temple, of Grand Rapids, Michigan, and the defendant by Messrs. Parker, Shields & Brown of Detroit, Michigan, and Oscar E. Waer of Grand Rapids, Michigan. Thereupon the following proceedings were had:

After recess. (The jury were excused out of the Court Room at 11:25 A. M.)

The Court: Well, go ahead.

Mr. Hall: May it please the Court, I think it is for the benefit of all parties concerned to tell the Court what actually happened in this transaction so that he may know the whole thing.

Mr. Waer: If the Court please, will the record show that the jury is not here?

The Court: Yes, may it be stated that the jury is not here, and that this is the voluntary statement of counsel before the opening statement to the jury.

8 Mr. Hall: This is simply for the purpose of acquainting the Court with the situation and not as suggested in chambers a self-serving statement or a confession against interest.

On October 20, 1917, the quartermaster at Camp Zachary Taylor awarded a contract for the November supply of potatoes, estimated at one million, two hundred and fifty thousand pounds, f. o. b. the cars at Camp Taylor. Camp Taylor is upon the line of the Southern Railway Company, and the railroad station is called Dumesnil. It is not a passenger station, it has never been a freight station until the camp was located there. On October 22, 1917, R. C. Kelsey made a contract with H. Elmer Moseley, a produce broker of this city, for forty cars of potatoes at \$2.63 a hundred, less the freight rate to Indianapolis, the potatoes to be No. 1 United States grade, to be shipped or to be loaded to the capacity of the car, approximately a thousand bushel, and the cars being shipped upon order bills of lading, consigned to the order of the shipper, at Louisville,



Kentucky, notify Marshall & Kelsey, care of the commissary at Camp Taylor. Cars going down from Michigan would go to Louisville on the Panhandle, Pennsylvania system, the Monon, Chicago, Indianapolis and Louisville, and the New York Central Lines, the Big Four being the terminal carrier. This station of Dumesnil is on the line of the Southern Railway Company. There was no through freight rate from Michigan points to Dumesnil. In consideration of the Southern Railway putting in the tracks, etc., to accommodate the camp, they were given a six cent arbitrary rate over Louisville. In other words, we were given a through rate from here to Louisville, and then it cost six cents more a hundred to get these potatoes from Louisville to Dumesnil. The drafts for the purchase price were to be attached to order bills of lading and eventually forwarded to the Commercial National Bank of Indianapolis for collection.

Moseley divided that order up by giving twenty cars to the Reed & Cheney Company of this city, ten cars to J. F. French and Company of this city, and ten cars to J. B. Conger of New Era, and shipments were made accordingly. That is French and Company shipped ten cars, Conger shipped six, Reed and Cheney Company shipped fourteen, when they were ordered to discontinue shipping on account of lack of storage at the camp, this order coming from Marshall and Kelsey on request of the quartermaster. After this order was given to Moseley, Marshall & Kelsey sent in another five car order, which was given by Moseley to another concern whom I do not represent in any way. French & Company made their shipments and took their drafts and attached them to the order bills of lading, the Grand Rapids Savings Bank forwarding the drafts and bills of lading to the Commercial National Bank of Indianapolis for collection. Reed & Cheney did the same with their drafts and bills of lading, only they dealt with the Commercial Savings Bank. Conger at New Era sent his drafts and bills of lading directly to the Commercial National Bank at Indianapolis, did not put them through the bank, and I believe that the Conger cars were billed to the order of the shipper at Dumesnil, Kentucky, they were billed directly through. When these cars got to Louisville, the Reed & Cheney cars and the French cars, the railroad changed the heading on the bill that came to the office, scratched out Louisville, and sent the potatoes out to Dumesnil without requiring the inspection or rejection or acceptance, or the production of the original order bill of lading, and they went out. No question but what some of them were unloaded, done without any question.

Now, just as soon as this Commercial National Bank in Indianapolis got these drafts, they were detached and they gave them to Marshall & Kelsey without requiring payment of a cent or anything of the kind, and he took them down and delivered them to the agent of the Southern Railway Company at Dumesnil. Whether he got it before or after the cars got there I don't know, but anyway these cars got in there along about the 17th or 18th of November, around there. And then on the 17th, Marshall & Kelsey notified H. E. Moseley that two cars had been rejected

by the quartermaster on the ground that the potatoes were frosted, and one of those cars belonged to Mr. French, was shipped by him, and he sent a man there to Louisville to see about the cars and this car, C. & O. 991, which is not involved in this transaction, and this car had gone into Louisville on the Panhandle, and Mr. Witkopp was the man who went down and went to Louisville, went to the Panhandle and asked them where the car was, and they informed him that the car had been taken right out to Dumesnil on this change of billing by the railroad agents in Louisville. So he went out there and he saw the captain of the quartermaster's department, and he asked him about the situation, and they told him that the potatoes had been refused by the government, and when the government refused a thing it was a closed story and that there was nothing to be done. That was on the 19th of November. On the 20th Kelsey again came to the camp because they were opening bids for the December supply, and Kelsey and Witkopp had a talk and Kelsey said that he would arrange with the government to take the good potatoes if Witkopp would sort them, and Witkopp agreed to do this and did so. I think he sorted three cars, and some Reed & Cheney Company's cars were rejected in the same way, and Mr. Sandberg went down for Reed & Cheney. Some of Mr. Conger's cars were in the same fix and Mr. Conger Jr., went down for Conger.

The government specifications upon which this bid was let allowed three per cent in weight of potatoes in a car on account of frost and injury, but not to exceed that. Eight cars were sorted by these men who went down there. In one—yes, I guess there were two cars of Reed & Cheney Company's cars that after they had been sorted out and weighed and taken by the government, there were only two of the cars in which the sorting went above three per cent, and of course should not have been rejected. The government actually took one million, fifty-three thousand, two hundred and eighty-four pounds of potatoes for the November supply. The Court will understand that we didn't know where the bills of lading were and we didn't know that the drafts had not been paid until the 30th of November or the first of December. On the 27th of November, the captain of the quartermaster's department informed the men who were sorting there and Marshall & Kelsey that they would take no more potatoes than could be unloaded by the night of the 28th, for the reason that the 29th was Thanksgiving day and a holiday, and the 30th they took their inventory, and they bought their potatoes for the December supply and that they had taken all they needed for the November supply. Then an investigation was started, and it was found that these bills of lading were in the hands of the Southern agent at Dumesnil. The matter was taken up with the bank and it was found that they were not paid, and demand for payment was made at the bank and refused. And then on the 7th Mr. Wylie and myself went to Indianapolis and we went to the bank and found that they did not have the bills of lading or the money. The claim of the bank was that they had given the bills of lading to Mr

12 Kelsey for the purpose of enabling him to inspect the potatoes, and further stating that he was the trust officer of the bank and they had delegated the bills to him for that purpose. But on the morning of the 3d of December, Mr. Kelsey went to the agent of the Southern at Dumesnil and succeeded in obtaining back the bills of lading on these twelve cars which had not been and could not be unloaded by the 28th of December, and these twelve cars that were not taken, nothing was done with them, they were not sorted or anything like that. Nothing had been done with them, they stood on the track there when the government had taken its November supply and refused to take any more on the November supply, and Kelsey got back the bills of lading on those twelve cars and took them back to the Indianapolis bank, and on the 4th of December the Indianapolis bank tendered the drafts to us. On the 4th day of December, Mr. Baker, agent of the Southern at Dumesnil, wired Mr. Moseley giving him the numbers of these cars, including the one in question, and said that the cars were on hand rejected. At the time the bank tendered us these bills of lading we neither refused to accept them nor accepted them but asked for time to consider and we went to Louisville the next day, but we could not accomplish anything there, investigating and that sort of thing, and came back. And our theory is that while the railroad company had committed a conversion by taking the cars beyond the destination without the production of the bill of lading there, yet the goods were perishable, they had been there for some time, the market price had declined about seventy-five cents a hundred during the interval, demurrage of sixty dollars had accrued upon every car. Marshall & Kelsey refused to do anything, the bank refused to do anything, the railroad company refused to do anything, so, for the purpose—and we knew that we could handle the potatoes to better advantage than the railroad company could, and so, after

13 giving notice to the railroad company that we, on account of the potatoes being perishable, we would attempt to handle the potatoes for the best interest of all concerned, and to make the loss as light as possible, we took back the bills of lading from the bank under protest, brought them back, and re-consigned the cars through the initial carrier. Re-consignment orders were issued by the carrier, we gave up the original bills of lading which we had and took re-consigning bills in their place. That was on the 7th of December. They didn't get them out of Dumesnil until some time the next week, and between the time we gave the bills of lading, the original bills of lading, back and asked for the re-consignment bill, the weather became extremely cold. It was below zero four days at Louisville, the temperature going at low as six degrees below zero, and when the potatoes arrived at destination they were in a more or less frozen condition, this car in question. They all went to different points. This car in question went to Memphis, Tennessee, and after paying the freight and all that sort of thing, we realized \$675.00, or \$411.00 out of the carload that had been sold for something over a thousand dollars, and we filed our claim for that amount or for the amount of the difference.

Now, my theory of the case and my best statement to the jury will be along the line that we had the right to have our car rejected at Louisville, if at all; that the railroad company had no right to take the car beyond Louisville and give it to another carrier without the production of the original bill. We did not sell to the government, we had no contract relations with the government, they were only to Marshall & Kelsey, and our cars should have been accepted

at Louisville and the original bill of lading surrendered there.

14 or they should have been rejected. Taking a car to a destination that was not named on the bill of lading, to assess us a six cent local rate in addition to our through rate to our contract destination, leaving the car out there for two or three weeks, to let demurrage accrue and the market price decline, all that sort of thing was an absolute conversion of the goods, and while we might not legally have been compelled to take the goods back and handle the goods in any way, we did it for the best interest of all concerned, following out the well known principle of damages to decrease them. And our claim is, that what the bank did with the bills of lading or that the Southern agent had the bills of lading and did not retain them, and that sort of thing, are immaterial in this case. We had a contract, it was violated, and it caused us loss. Now I may have stated the facts a little different than they actually appear, but that is, I think, a substantial statement of what the transaction in reality was. Now, I prefer to make my statement to the jury.

The Court: Bring them in.

Mr. Hall: May it please the Court and gentlemen of the jury, I want to tell you now what we claim the facts in this case are which entitle us to a recovery from the defendant in this action. I have already stated that it involved this loss on this car of potatoes, N. Y. C. 151473, which was loaded with 300 sacks or 750 bushels of potatoes at Bailey, Michigan, and delivered to the Pere Marquette Railway Company at that point on November 3d, and for which the Pere Marquette Railway Company issued to us what is known as an order bill of lading, whereby the goods were consigned to the order of J. F. French & Company, destination Louisville, State of Kentucky, notify Marshall & Kelsey, care of Capt. Bernard, commissary, Camp Zachary Taylor, Kentucky, and the bill of lading bore

15 the notation, allow inspection. These goods were shipped upon an order between J. F. French & Company and H. E. Moseley, who was the broker who made the contract with Marshall & Kelsey. The purchase price was \$2.63 a hundred, less the freight rate from the point in Michigan from which the car was shipped to Indianapolis, Indiana. Now, the usual way that such shipments are handled, and the way in which this shipment was handled, is as follows: Railroad companies have two forms of bills of lading. One is called the straight form, which is not negotiable, and the other is called the order form, which is negotiable. The straight form of bill of lading is printed upon white paper. The original of an order bill of lading is printed upon yellow paper. When you make a shipment on order bill of lading, or on a straight bill of lading, the title

to the goods vests in the person to whom you ship. If any of you gentlemen were shipping a carload of anything or a local shipment of anything to Chicago, billed to John Smith, the title to those goods vests in John Smith, and the carrier is entitled and has the right to deliver those goods to John Smith without the production of any bill of lading. The order bill of lading retains the title to the goods and the right to possession of the goods in the person by whom they are consigned for the purpose of compelling the payment of the purchase price of the goods. It is what is called a negotiable bill of lading. We had sold these goods to Marshall & Kelsey through H. E. Moseley. We were to receive pay for these goods before they were to be delivered to anybody, particularly to Marshall & Kelsey at Louisville, Kentucky. We drew a draft for the purchase price of our goods upon Marshall & Kelsey. Then came up the question of freight. That can be handled in one of two ways. These goods, and most of the goods of that kind, are sold on a delivery basis.

16 In other words, our price for these potatoes was \$2.63, to Marshall & Kelsey, less the freight rate to Indianapolis. We had to stand whatever the freight rate was from Bailey to Indianapolis, and so in making out our draft we knew what the freight rate was and we deducted the freight on these from the invoice of this shipment, and made our invoice for the net amount, which in this instance, was \$1,086.75. We prepared that draft, we attached it to the original order bill of lading which we had obtained from the railway company when we delivered the car to them, and we took the bill of lading and the draft to our bank, which in this case was the Grand Rapids Savings bank, and deposited it with them and they gave us full credit for the amount of our draft upon our commercial checking account. You see, we had bought these potatoes from the farmers and paid cash for them, put them in our warehouse. Then when we got this order and could ship them out, had a sale for them, just as soon as we got the bill of lading and could get it in the bank, then we could get our money, using our money in our business and buying more potatoes and that sort of thing. It is a good method of keeping the money in circulation. The bank was instructed to send—this bank was instructed to send the bill of lading to the bank where Marshall & Kelsey lived, for the purpose of presenting it to them and having them pay for it. The effect of this notify on an order bill of lading is to give the name and the address so that the railroad company, when the car gets to destination, can call up the person who is intended to receive it and let him know that the car has arrived. Now, another good feature of this bill of lading is that it bears the notation, allow inspection. Your car, supposing now you show upon an order bill of lading consigned to your own order at Chicago, Illinois, notify John Smith, the railroad

17 company calls up John Smith and tells him the car is here.

He hasn't seen the goods, he doesn't know whether they are what they should be or not, but if the bill of lading bears the notation, allow inspection, he has a right to go to the railroad office—to go where the car is, and inspect the goods in the car. If they are all right and he wants to take them, he must produce the original

order bill of lading to the railroad company, and that bill of lading has printed on it in bold print these words: "The surrender of the original order bill of lading properly endorsed shall be required before the delivery of the property." Inspection of the property covered by the bill of lading will not be permitted unless provided by law or unless permission is endorsed on the original bill of lading or given in writing by the shipper. This bill of lading did bear the notation, allow inspection. So, when the notified party was called, when he has inspected the goods and finds that they are all right and wants to take them, then he must get the bill of lading. In order to do that, he must go to the bank. Before the bank will give him the bill of lading, he must pay the draft. So that he knows the goods are all right before he pays for them, and before he takes them we get our money. Then the bank to which the draft and bill of lading has been sent remits to our bank at Grand Rapids. They charge us interest upon the amount of this draft from the time that they have given us credit until they get the remittance from the bank to which they have sent it. That is the way of handling order bills of lading. Now, if they do as sometimes happens, something is wrong with the shipment, whatever cause, it doesn't make any difference—if the person looks at it, which he has the right to do, shipped on an order bill of lading, and it is not what he thinks he should

18 have, why then he can reject, and then it is up to the shipper to do something with it. Whatever rights he may have against the person for rejecting it, it may have been a wrongful rejection, it may have been right, but that has nothing to do with the case; he doesn't get the goods unless he pays for them. Now, gentlemen, that is what should be. That is not what happened. We knew at the time we made this contract in a general way that Marshall & Kelsey had a contract with the quartermaster at Camp Taylor to furnish some potatoes, but we had no contract relations with the government, had nothing whatever to do with it. We were dealing entirely with Marshall & Kelsey, so that is why our bill of lading reads, notify—bill to our own order at Louisville Kentucky, and notify Marshall & Kelsey. We shipped on an order bill of lading to insure payment for these goods before they took them. In this case, gentlemen, we were deprived of that right by reason of the railroad company, when that car got into Louisville, it did not keep it there, it didn't notify Marshall & Kelsey there, it didn't require Marshall & Kelsey to inspect the potatoes there or to reject them, or if they took them to produce the original order bill of lading; but, contrary to the terms of the bill of lading, they delivered this carload of potatoes to an entirely different railroad and allowed that railroad company to take them to a station called Dumesnil. Dumesnil is a station on the lines of the Southern Railway Company where Camp Zachary Taylor is located, and, as I say, they took the car out there. There are—in the shipping of potatoes or the shipping of anything, freight rates are an important factor, and there are through freight rates and local freight rates. It is an advantage to get through freight rates because they charge for the one distance all the way through, and it is much cheaper and that sort of thing than shipping from point to

point and that sort of thing where you have to pay local rates. For instance, if you shipped this car of potatoes to three or four points before it got to Louisville, the sum of your local rates would be much more than your through rate. And this town, this station of Dumesnil, it is only twelve miles from Louisville, Kentucky, and it is a distinct station by itself, built entirely for the camp. The camp is the only thing that is there. And while the rate from Bailey to Louisville is something like 24 cents a hundred pounds, I think—I am not sure that that is exactly correct, the evidence will show—the freight rate for carrying this car of potatoes from Louisville to Dumesnil, a distance of twelve miles, is 6 cents a hundred, at least a quarter, if not more, of the cost for the entire distance. And then too, there is no market for potatoes at Dumesnil, the government is the only buyer, and if anything happened to these potatoes you would not only have to pay your local rate in there to Dumesnil but you would have to pay it out, the local rate out. The local rate out was not quite as much as the local rate in, but anyway it was a local rate, and Louisville is a town of 150,000 people or something like that, I believe, and there is a considerable market for stuff there while there was no market for anything at Dumesnil. And we claim that the action of the railroad company in taking that car beyond Louisville and taking it to Dumesnil was entirely wrongful, unlawful, was a violation of our contract and in legal effect it was a conversion of our goods. On the 4th day of December—do you want me to finish?

The Court: I guess we had better suspend.

Mr. Hall: It will be some time.

The Court: We will suspend until two o'clock.

Whereupon the court took a recess until two o'clock P. M.

Tuesday P. M., March 26, 1918.

Mr. Hall: May it please the court and gentlemen, I think I told you about this car being at Dumesnil. I do not know just what time it got there, somewhere I should say, anyway prior to the 25th of November. That doesn't make any particular difference. On the 4th day of December we received word from Mr. Baker, the agent of the Southern Railroad at Dumesnil, that this car was rejected, on track unclaimed at Dumesnil. The bills of lading, original order bills, at that time were in the Indianapolis bank where they had been sent by this plaintiff. The railroads refused to do anything with the goods, refused to handle them in any way. They were perishable, and at this time about \$60 demurrage had accrued upon this car. There was this local freight rate that I have told you about from Louisville to Dumesnil had accrued upon it, the market price of potatoes had declined about 75 cents a hundred, and they threw the car back on our hands and refused to do anything. Following the usual measure of damage or the usual rule of law in damage actions, it is the duty of a party to make his loss as light as possible. So we gave notice to the railroad company that we claimed they had been negligent and caused us this loss because



of their negligence, but because we thought that we, being in the potato business could handle these potatoes to better advantage than the railroad company could, not being in the business and that sort of thing, we took these potatoes, took the bills of lading and brought the bills of lading back to Grand Rapids, delivered them to the initial carrier, the Pere Marquette Railroad Company, and re-consigned them for the purpose of disposing of them and handling them for the best advantage for the benefit of all concerned and making our loss as light as possible, and there was no market at this town of Dumesnil or the camp for these potatoes, they had to be taken away from there. So when we delivered the original bill of lading

21 that had been issued at Bailey to the railroad company, which they required, they issued us a new bill of lading from Grand Rapids, Michigan, on December 7, whereby these goods were consigned to the order of J. F. French & Company, destination Memphis, Tennessee, notify McKnight & Hill, and the railroad company endorsed on this bill of lading which they issued to us, this bill of lading is issued in exchange for bill of lading No. 19, issued at Bailey, Michigan, on the 5th day of November, by the P. M. Railroad Company. The car went down to Memphis, Tennessee, arrived there, I think, about the 18th of December, and it was sold by McKnight & Hill and disposed of. As I told you in the earlier part of my statement, the sale price, the total sale price of the potatoes in this car originally was \$1,183.50. The freight to Indianapolis, according to our contract, was \$96.75, making a total net price to us of \$1,086.75. Now, just bear in mind that this original freight that we had to pay was \$96.75. When this car got to Memphis, we were compelled by the carriers to pay freight of \$233.51; we were compelled to pay \$60 demurrage which had accrued upon this car while it was standing upon the track at Dumesnil. Demurrage, whether you know it or not, is a charge assessed by the railroad company for holding cars beyond a certain time. Usually two days' time are allowed to unload a car, and then it used to be that a dollar a day demurrage was charged for any time that the car was on track under load after the two days' free time. They have changed that rule lately—had changed it at this time on account of traffic conditions; they had materially raised the demurrage charge in order to induce shippers to promptly unload and that sort of thing, and at this time there was a graduated demurrage charge going up to at least as

high as \$5 a day. Anyway, they charged us \$60 demurrage 22 for the time that this car had stayed at Dumesnil. They charged us \$5 for reconsigning the car from Dumesnil to Memphis, Tennessee. The time this shipment was made in October, the time our contract was made, the government law putting in a war tax upon shipments of any kind had not taken effect. It took effect the 1st day of November. Our contract was made before that, and we claim that under this contract we were not obliged to pay the war tax. But this car got down there to Memphis, on the 18th of December, and they made us pay a war tax of \$6.98. They charged us a switching charge of \$2 to get the car out, charged us \$2 demurrage at Memphis, it cost us \$16.40 for labor in sorting out the potatoes.

The potatoes were in bad condition when they got there, and we had to pay a commission for the re-sale of the potatoes of \$7.50. The car brought on the re-sale \$743.85 at Memphis as compared with our original sale of \$1,183.50. These expenses which I have enumerated and the charges which they compelled us to pay amount to \$332.39, leaving the net out-turn of the car of \$411.46. In addition to that, French & Company was put to the expense of sending wires, long distance telephone messages, sending a man to investigate the condition when he found out those cars had been rejected on December 14 or thereabouts, which amounts to a considerable sum and which the evidence will show. There were 45,000 pounds of potatoes in this car when it was shipped. There were 31,300 or something like that—the evidence will show the exact amount—of good potatoes when it arrived at Memphis, Tennessee. These potatoes were sold there at the market price of \$1.30 a hundred. And so we sue for our loss on the car of \$675.29, plus the expenses that French and Company were put to in making the investigation, etc., which will be shown by the evidence. Now, it will appear in this case that the Pere Marquette Railway Company does not go from Bailey, Michigan, to Louisville, Kentucky. I believe there were two carriers anyway and possibly three to take the car from Bailey to Louisville.

If there is a middle carrier, for instance, I think that car went to Benton Harbor and was taken by the Big Four right into Louisville. If that is true, the Pere Marquette Railway Company is what is termed in law the initial carrier. It may be that the Pere Marquette Railway Company did nothing whatsoever wrong in this matter. Its billing may have been exactly right; it may have transmitted the proper billing and the proper instructions to its connecting carrier; and it may be that the terminal carrier in Louisville was alone guilty of the wrongful acts which actually caused the loss. But we have in this country an act of Congress which is commonly known as the Initial Carrier's Act, which makes the initial carrier liable for the acts of the connecting carriers and the terminal carriers.

Mr. Warr: If the court please, I suggest that counsel leave matters of law for the instruction of the court and not for matters of presentation by counsel to the jury.

Mr. Hall: I think that is proper, your Honor, to show my theory of the case and that sort of thing.

The Court: Well, go on. I think perhaps if you show the facts, then you can state your claim as to liability. I will state the law to the jury when the time comes.

Mr. Hall: All right; I will state it as I claim. That the initial carrier is liable for all the carriers, no matter who is actually to blame, and I think that the court will charge you that that is the law. So we claim it doesn't make any difference in this action who actually did the wrongful act, which carrier did the wrongful act, that the Pere Marquette is responsible to us nevertheless. And then

I think the court will charge you that it has a remedy over, if the other carrier did any damage. Now, I am perfectly frank with you, gentlemen, and I want to state that there are

other facts concerning this transaction. I say concerning. I don't think they are material to this transaction in any way. These other facts—or what I have stated to you now is my theory of what the facts are as far as they are material to this action and as far as then is any need to go. Now, the defendant undoubtedly has another theory. I don't know which is right. The court will tell you which is right, and you will be guided by what the court tells you in the regard. But, I say that I have stated to you all the facts which I believe are material to this action. I think that these other facts are no more material than the day of the week that this car was actually shipped from Bailey, whether it was on Monday or whether it was on Saturday. I don't think they make any more difference than that. However, we can't tell what the court will say about it and he may allow other facts to come before you, and if he does, why that is all right. We are not afraid of any of the facts and that sort of thing, but I am telling you now what I believe is our theory and what facts, as I have stated to you, are the material facts in the transaction.

JAY F. FRENCH, sworn for the plaintiff, testified as follows:

Direct examination.

By Mr. Hall:

My name is Jay F. French and I reside at Grand Rapids, Michigan. The name of our firm is J. F. French & Company, composed of J. C. Wallace of Hart, and myself. Our place of business is 235 Ionia Ave., Grand Rapids, and we are engaged in the wholesale produce business and deal in potatoes. We have a place of business at Bailey, Michigan, and have a warehouse there and a man to buy from the farmers and load direct. His name is H. Barnum. 25 and he buys potatoes and beans and hay.

I have a recollection of New York Central car No. 151472. It was loaded with potatoes sold to Marshall & Kelsey through H. E. Moseley, broker, of Grand Rapids, at \$2.63 a hundred, we to allow the freight to Indianapolis, from Bailey or to deduct the cost from the shipment.

This (pointing to document in hands of Mr. Hall) is a copy of the order bill of lading of the New York Central car just referred to. This (pointing to yellow paper produced by the attorney for the defendant) is the original bill of lading.

(The first paper being a blue paper marked for identification Exhibit "A"; the second paper being a yellow paper and being the original order bill of lading and marked for identification Exhibit "B".)

Witness (continuing): When I got Exhibit "B" these notations in ink were not on it. (The notations in ink were: "Cancelled. new B/L issued in exchange. Dec. 11, 1917. F. M. Briggs, D. F. A. P. M. Ry.") The notation in pencil "Dumesnil, Ky.," was not on Exhibit "B" when I originally received it from the loader.

I could not state because I did not notice whether or not this writing that is on there in pencil (pointing to the words "Dumesnil, Ky.") was on the paper when I re-delivered it to the Pere-Marquette Railway Company in December.

Mr. Hall: Well, then I offer it in evidence—strike that out. Under the ruling of the court, I offer in evidence as one exhibit, the original yellow copy marked exhibit "B" for identification, and the blue, marked Exhibit "A" for identification.

The Court: Let them stand; both be received.

(Papers marked Exhibit "B".)

Q. Calling your attention to the yellow portion of Exhibit "B" including the endorsement thereon, I ask you if that is the official endorsement of Jay F. French & Company?

A. It is.

Q. Who is F. Valley?

A. Bookkeeper.

The contents of the yellow bill of lading were read to the jury by Mr. Hall. During the course of the reading the following occurred:

Mr. Hall: \* \* \* The notation in ink—

The Court: Well, you need not read that. That is not the part that you offered.

Mr. Hall: Well, I thought you said it was all going in.

The Court: No, I did not. I said you could offer a portion. You are not obliged to read that unless you want to.

Mr. Hall: Jay F. French & Company, by F. Vailey. Here is a rubber stamp on the back of it, reported by number 8395, Commercial National Bank, Indianapolis, Indiana. And the blue of it is just exactly the same, the parts that I have read. It bears a pencil notation, number 66.

Q. What is that, Mr. French?

A. I \* number.

Q. \* is one you put on?

A. \* air.

Mr. Hall: And it has no endorsement on the back.

Q. Now, when you got that order bill of lading, what did you do with it?

A. I made a draft on Marshall & Kelsey, put it through our bank.

Q. Well, after you made the draft on Marshall & Kelsey what did you do with that with reference to the bill of lading?

A. Well, the bill of lading was sent with the draft attached to the Commercial National Bank at Indianapolis.

Q. Well, I know what you did in your office. You made that draft and you had that bill of lading. What did you do with the two copies?

A. I had one copy. That was filed with our lot number.

The Court: No, he means the original bill of lading and the draft. What did you do with those papers? Did you send them directly to the bank in Indiana, or did you take them to some bank here?

A. Put them through the Grand Rapids Bank.

Q. Were they attached together?

A. They were.

Q. Draft attached to the bill of lading?

A. Yes, sir.

Q. And then you endorsed the bill of lading?

A. Indorsed it before we attached it.

Q. And that draft was drawn on them?

A. Marshall & Kelsey.

Witness (continuing): The amount of the draft was a thousand eighty-six dollars and seventy-five cents; that was after deducting the freight. When we gave the bank the draft and the bill of lading, the bank gave us credit for the full amount of it and we delivered the papers to them.

After December 5th, when the bill of lading was turned back to us, we diverted the car out of there to Memphis, Tenn. After I put this bill of lading and the draft in the bank, I next saw the yellow portion of it, the original, on the morning of December 7th, when I took it to F. M. Briggs' office for reconsignment.

Q. What did they tell you you had to do with the original order bill if you wanted to reconsign?

A. I don't remember that they told me anything.

Q. Well, did they tell you that you could keep that original?

A. Why, we can't keep it, never do.

I turned it in to them and gave them a new bill of lading all made out, and told them to divert the car. He executed the new bill of lading, both the yellow and the two copies, and I got the yellow original and the blue copy. The original I forwarded to Memphis, Tennessee, and the copy I kept in our files for record. This paper (paper shown to witness by Mr. Hall) is a copy of the bill of lading on the car in question, rebilled on December 7th.

Mr. Hall: I offer it in evidence.

Mr. Waer: Object to it for the same reason that it is not the best evidence. We produced the original, if the court please. Before getting to that point, we object to any evidence being offered as to the issue of this reconsignment bill of lading the witness speaks about, on the ground that it is incompetent under the declaration in this case, not being the bill of lading upon which this car moved from Grand Rapids by way of the Pere Marquette as initial carrier and by way of the Big Four as the connecting carrier.

The Court: Well, I suppose this is offered for the purpose of showing what was done to save damage to the car, not as a basis for recovery?

Mr. Hall: That is all, your Honor.

The Court: What was subsequently done with the car in order to save loss would be material as bearing upon the subject of damages,

but I apprehend that liability must depend upon the first order bill of lading and what was done with the car in Louisville by the defendant company or its terminal carrier.

Mr. Waer: If you—Honor please, on the question of damages, our claim also is that any *proof* of damages accruing—arising at any place such as Memphis, Tennessee, is incompetent, as against the defendant Pere Marquette Railway Company, as not arising out of the contract of shipment under which this car moved from Bailey, Michigan, to Louisville, Kentucky.

The Court: Well, that is a question I can take care of later, but on the plaintiff's theory the testimony may be received.

Witness (continuing): This is the original (pointing to paper shown him) that I received on the consignment. I got it from Mr. Briggs' office. Mr. Briggs is division freight agent.

Mr. Hall: I offer the original in evidence.

(Paper marked Exhibit "D".)

Witness (continuing): This notation "Re-consignment accomplished 12-8-'17" was on the paper when it was delivered to me.

Q. Why did you send this car to Memphis?

Mr. Waer: Object to any testimony along that line for the reason already stated.

The Court: Take the answer.

A. It looked like the best market to clean it up.

Q. Well, why did you have to clean it up?

A. Well, it could not be sold at Louisville. That market was full, there was no market at Dunesville, it had to go south in order to get the through rate, and Memphis looked like the best market. That was one of the best markets there was at that time.

Q. Well, why did you undertake to handle it at all?

A. Because the shipper usually can get more money out of the goods than the railroad company or anybody else that is not connected with it.

Q. Why is that true?

A. Because they understand the business, they know where to place these things, they know who to go to to get them handled.

Q. Well, did you endeavor to get as much as you could out of this car of potatoes?

A. Yes, sir.

Q. And is that why you sent them to Memphis?

A. Yes, sir.

Q. Did you finally get returns from Memphis?

A. We did. I do not know of my own personal knowledge where this car went after it left Grand Rapids, or after it left Bailey. All I know is what somebody has told me as to where it was.

Cross-examination.

By Mr. Waer:

I went to the office of Fred Briggs myself when I obtained the second yellow bill of lading marked Exhibit "D". I saw Mr. Tyler and not Mr. Briggs himself. I don't recall that I told Mr. Tyler anything as to why I wanted this second bill of lading issued, only that we had to get the car out of there and handle it. I presented to him the original bill of lading and told him that I wanted the car reconsigned to Memphis from Dumesnil, where it was then. I don't recollect that I told him anything else at that time except what I have stated. He knew what the difficulty was.

Q. And upon your telling him that, he issued this Exhibit "D" and told you he would call for it when the reconsignment had been effected, is that true?

A. He issued that the following day, on the 8th.

Q. You yourself did not tell him anything about the bills of lading having been taken to the—from the bank at Indianapolis without payment of the draft, did you?

Mr. Hall: Just a minute. I object to it as incompetent, irrelevant and immaterial and having no bearing upon this issue.

The Court: Well, no liability is sought to be predicated upon the issuance of this reconsignment bill of lading, according to the plaintiff's claim.

Mr. Waer: If that is true, I withdraw the question.

11 The Court: That is as I understand it.

Mr. Waer: The question withdrawn. That is all, Mr. French.

Mr. Hall: That is all.

Redirect examination:

Q. Did you know McKnight & Hill prior to the time you sold them this car?

A. In a business way; yes, sir.

Q. And in what manner had they handled your cars prior to the time?

A. As broker.

Mr. Waer: We note the same objection on the same ground as the other as proof of the facts subsequently occurring is incompetent and immaterial.

The Court: The testimony will be taken subject to your objection and exception.

Witness (continuing): They have handled our shipments before to good advantage. I also knew D. Canale & Company before. They are a good commission firm. I used my best judgment in sending these potatoes to McKnight & Hill. I thought they could get the most out of them at that time, and there was nothing more I could have done that would have made this loss any less than it was. The charge of \$7.50 commission on a resale of the potatoes was reasonable,



and the charge of \$16.40 for re-sorting was also reasonable, as was the charge of \$2.00 for demurrage. When the contract was made with Moseley nothing was said about the war tax to be paid to the shipper and the contract was made before the war tax took effect.

Q. I will ask you if you knew what the freight rate from Louisville, Kentucky, to Dumesnil was at the time in question?

A. Six cents a hundred.

Q. Could you get a through rate from Dumesnil from here?

A. Well, I never tried it, but I understand you cannot.

Mr. Hall: Will it be agreed that the Southern Railroad Company charged six cents local rate for carrying the potatoes from Louisville to Dumesnil in addition to the through rate from Bailey to Louisville?

Mr. Waer: Yes, that is true.

Q. Do you know now what the freight rate from Bailey, Michigan, to Indianapolis was on November 3rd, 1917?

A. Yes, sir.

Q. What was it?

A. Twenty-one and one half cents a hundred.

Q. Do you know what the general market price of potatoes was on the Indianapolis basis about December 6th, 4th to 6th?

Mr. Waer: If the court please, to that testimony we offer the objection, additional objection, that it is not a question what it was at Indianapolis and at Memphis. They have gone one step further.

Mr. Hall: No, your Honor, our theory is this, that we had a sale of those potatoes at certain prices on the 4th and 6th of December. We had to take the potatoes back and did take the potatoes back. Now, what I want to prove is to show that the situation as to the market price had changed on the 6th of December when we sold the stuff.

The Court: Well, that is the measure of damage in case of misdelivery and a reclamation by the shipper?

Mr. Hall: It is the invoice value less the amount of salvage. By salvage I mean the out-turn less the additional expense.

Mr. Hall: That is the theory of it, your Honor, to show that when we did take these bills of lading back, that the goods were not returned to us and we were not put in status quo. That is the theory of this testimony.

The Court: Has the market price at the point of destination anything to do with it?

Mr. Hall: Why, I do not think so; you see, not on this question.

The Court: Well, what is your claim about it, Mr. Waer? Is that your claim, is that why you are objecting to all this testimony but the market price at Louisville is controlling?

Mr. Waer: Well, I did not object to it on that ground. My objection was simply based upon the ground that no testimony as to any damages arising or occurring anywhere off from the lines of the railroad which carried this shipment on the original bill of lading is at all material. As far as these plaintiffs are concerned,

we are only liable as initial carrier, if at all, and what happened after that time we are not concerned with at all.

The Court: You were not taking advantage then of the resale of the property?

Mr. Waer: If we were responsible for the damage prior to the time of delivery by the terminal carrier, our damage would be measured by the damage that occurred up to that time. If there has been no damage up to the time we made delivery, of course, the initial carrier could not be held.

The Court: I just want to understand this matter from your respective standpoints. If there was a wrongful delivery of these goods, of this carload of potatoes, to the Southern Railway Company at Louisville, then the measure of damages for the conversion would be the value of the car of potatoes according to the invoice price as I understand your claim to be?

Mr. Hall: That is it, your Honor.

The Court: Now, unless there was a misdelivery, there can be no recovery. If there was a misdelivery and the plaintiffs are entitled to recover whatever differences the plaintiffs obtained for this carload of potatoes, if they acted in good faith and sold to the best advantage everything considered, would be a matter of deduction from the sum total of their damage. If the car had been utterly lost, then the damage would have been the invoice price. If it was only partially lost, the invoice price will be reduced by the amount received on a resale of the portion of the carload of potatoes.

Mr. Waer: I hardly think, if the court pleases, that that would be the measure of the damages. If there was a misdelivery of the car as claimed by the plaintiffs so that there was in effect a conversion at Louisville by the delivering carrier, then his damages certainly would be a market value at the time and point of conversion, or the difference between that market value and what he was to receive for it.

The Court: I don't understand you. If he sold—if the plaintiff sold a carload of potatoes under contract to be delivered at Louisville at \$2.66 per hundred, and on the arrival at its destination the car was diverted by the railroad, do you say that the measure of damage would be the difference between the market value of potatoes there and the invoice price? Wouldn't the measure of damage be the entire invoice price which the plaintiff had lost?

Mr. Waer: I think not, your Honor. In cases of conversion the measure of damages certainly does not exceed the market price of the thing converted at the time and place of conversion.

Mr. Hall: I have a case on that point if your Honor wants any authority.

The Court: Well, have I got the wrong notion of that?

Mr. Hall: I think you are exactly right. If the car was utterly lost, for instance, if we had been within our rights and refused to do anything with the car and there had been a misdelivery, we would be entitled to the full invoice of the property. Now, we thought it was our duty to minimize the damage.

We took the car and we did get something out of it for which we are perfectly willing to give the railroad company credit. So if we are entitled to recover, we are entitled to recover the invoice price less what we actually got out of it after the expenses were paid, etc.

The Court: Well, that strikes me to be a reasonable rule anyhow. For the time being we will let it stand on that basis. What was the question here? Who asked that question?

Mr. Hall: I did for the purpose of showing that at the time we undertook to handle the car that the status had changed from the time the railroad company had first made the misdelivery.

The Court: Well, that is at Indianapolis, and the car was sold at Memphis.

Mr. Hall: Yes, your Honor; but we sold on an Indianapolis basis. This original car was sold at \$2.63 a hundred less the freight to Indianapolis. That was our basis of sale. Now I want to show that on that same basis the market price was less on December 4th and 6th.

The Court: I don't see how that can be material. You did not take charge of it, you shipped the car down to Memphis and sold it down there. You have got to hang on one horn of the dilemma or the other, and not on both of them.

Mr. Hall: You don't understand me, your Honor. I am sorry I have not made it more clear.

The Court: I am sorry I am so dense about it.

Mr. Hall: Well, I don't think you are dense; I think it is because I haven't explained it. For instance, it is shown—well, you know what I said this morning about the bills. Now, at the time those bills were in the bank on December 5th, the status had entirely changed, the attitude of the railroad company in saying, here are your potatoes with a six cent local rate added to them and a decline in the market price on top of it could not possibly be a tender of those potatoes, because they did not put us back in status quo. The purpose of this testimony is to show that the status was different at the time they claimed that the title to those potatoes was in us.

The Court: That is a matter for rebuttal. I think that is enough. You have laid a foundation for your measure of damages.

Mr. Hall: All right.

The Court: Now you are anticipating the defense, and there is no testimony before the jury, at least upon which that measure of damages could be based.

Mr. Hall: All right.

Q. On what day, Mr. French, did you receive this original bill of lading from Bailey, in Grand Rapids, after it had been sent to the Indianapolis bank?

A. December 7th.

Q. And whom did you receive it from, who personally delivered it to you?

A. You did.

Q. And then you did what with it?

A. Took it down to Mr. Briggs' office and reconsigned the car.

Q. And then what did you do with reference to the bank?

A. Detached the draft and turned it over to the bank and gave them a check for it.

Q. And did you do that on December 7th or 8th?

A. Well, it was done immediately there. I think it was accomplished on the 8th. That is a matter that would have to be handled by the bookkeeper.

PETER WITKOP, a witness sworn on behalf of the plaintiff, testified as follows:

My full name is Peter Witkop and I live in Grand Rapids, 37 and am employed by J. F. French & Company as traveling adjuster and salesman. I was at Louisville, Kentucky, in November and December, 1917, and saw N. Y. C. car No. 151473 at Dumesnil. I saw it there along about the 25th or 26th of November. I think I last saw it the day after Thanksgiving on the track at Dumesnil. That is the only time I have seen the car. Dumesnil is a government cantonment named "Camp Zachary Taylor."

Mr. Waer: I ask that all the testimony of the witness be stricken out, on the ground that it is in no way competent against the Pere Marquette Railway Company under the issue in this case.

The Court: Let it stand.

By Mr. Hall:

Q. I will ask you one other question. What railroad runs through Dumesnil?

A. The Southern Railway.

Q. Any other?

A. No, sir.

Q. On the tracks of what railroad was this car?

A. Southern.

Cross-examination.

By Mr. Waer:

I went to Dumesnil about the 18th or 19th of November on orders from J. F. French & Company to look up a certain car. I was there from the 18th or 19th until after Thanksgiving, several weeks. I talked with a man in charge of the office of the Southern Railroad at Dumesnil during that time.

Q. You saw, didn't you, at one time or another when you were in that car, that the bill of lading for this particular car was there in the depot?

A. Ask me that again, please.

Q. At various times when you were in that car which represents the depot—they have a coach there for a depot?

A. Yes, sir.

Q. You learned or saw, did you not, that original bill of 38 lading which covers this car?

Mr. Hall: Object to it as immaterial, irrelevant and incompetent.  
The Court: Take the answer.

Mr. Hall: Just a minute so that I can get my full objection. He is talking about the agent of the Southern Railroad which is beyond the bill of lading destination by a carrier who does not operate north of Louisville, this side of Louisville, and the fact that that bill of lading was in the hands of the Southern agent at a point beyond destination, the Southern not being a party in any way to the original contract, is incompetent, irrelevant and immaterial.

Mr. Waer: If the court please—

The Court: Just a moment. That bill of lading is endorsed in blank, is it not?

Mr. Waer: Yes.

The Court: It is negotiable?

Mr. Waer: Yes.

The Court: And the terminal carrier is justified in delivering it to anyone presenting the bill of lading thus endorsed?

Mr. Hall: The terminal carrier?

The Court: Yes. Now, the question is, as to whether the agent of the Southern road had this order bill of lading duly endorsed in its possession while the goods were in the possession of the Southern Railroad?

Mr. Hall: No, no, your Honor; because the Southern Railroad was not the connecting carrier at Louisville.

The Court: You have not followed me. I will take the answer.

Mr. Hall: Yes, I have followed you. You do not get my theory, that anything that happened after this car got beyond Louisville without the production of the original bill of lading there, is incompetent, irrelevant and immaterial.

39 The Court: Well, that is true; but the fact that the agent of the Southern Railway had the order bill of lading in its possession at the time the car was in its possession would be pertinent evidence as bearing upon the question as to whether or not at the time the car was delivered to the Southern Railway, the agent did not also have the order bill of lading duly endorsed in its possession. While this standing alone would not perhaps be enough, it is a part of the chain of evidence which might lead to that result.

The Court: Go ahead.

A. I saw this bill of lading once in the hands of the Southern.

Q. The bill of lading covering this car?

A. Yes, sir.

Mr. Waer: That is all.

By Mr. Hall:

Q. When was that?

A. That was November 30th, I am quite sure.

Mr. Hall: That is all.

By Mr. Waer:

Q. And the car was there at Dumesnil at that time on the tracks of the Southern, was it?

A. Yes, sir.

Mr. Hall: Before I call this witness, something was said by Mr. Waer that he did not care about several things. That was my theory, and the party made the statement. I don't know just what counsel was getting at, but I don't want to be bound by my silence as having acquiesced in that statement. I want to make that statement on the record.

Mr. Waer: I withdrew my question on the assumption that counsel did not object that my question was no longer material.

The Court: Well, the point was that from your opening statement and from what has been said since the case was begun, I did not understand that you were predicated any liability against the defendant company, the Pere Marquette Company, on the reissuance of this order bill of lading in reconsigning the car to Memphis.

Mr. Hall: Well, my theory on that is, your Honor, that the reconsignment having been made upon the initial line, that the initial carrier is liable for anything that happened up to the time the car got to Memphis.

Mr. Waer: If the court pleases, if that is true, we would have to renew half a dozen objections which we made upon which the court ruled, and I think counsel cannot now change front and say that.

The Court: Well, just a moment; now, I don't want to deprive the plaintiff of any claim he made by any ruling I have unwittingly made. I understood from the opening statement that your claim was that this car had been diverted at Louisville by the terminal carrier and delivered wrongfully to the Southern Railway, and thereby the initial carrier became liable for the value of the car or the contents of the car less whatever you had been able to save from the wreck.

Mr. Hall: That is true.

The Court: And that in order to save the car and minimize the damage, you got this reconsignment from the initial carrier here, and the car was taken to Memphis where it was sold to the best advantage, and you have stated the amount realized in your opening statement that you expect to give the defendant credit for, and claim that the balance is your due in addition to the expenses which you have enumerated. Now that is your case. Now, on what theory do you claim any damage by reason of this reconsignment?

Mr. Hall: Well, you have stated my theory, your Honor. Here is what I thought, that some of the damage—

The Court: What is that?

41 Mr. Hall: Some of the damage might actually have occurred after the reconsignment bill of lading was issued.

The Court: Oh!

Mr. Hall: And we claim that they are liable for all the damage, but under your statement it would be covered because you have said

you understood my claim that it was a conversion of the goods when they sent it beyond Louisville, and they were liable for the value of the car less what we got out of it, and what we got out of it, of course, would include anything that occurred after the car left Dumesnil.

The Court: Well, you have to show simply due diligence in taking possession of and disposing of the product. The action of the elements would be an element that would enter into the sale, subsequent sale and disposition of the car. I now know what you refer to, and that is only one of the incidents that would actually follow in case a conversion had taken place before.

Mr. Hall: Yes.

The Court: So that really we get right back to where we started. Your action must stand or fall upon the proposition that there was a conversion by the terminal carrier without any justification in law in transferring this car to the Southern Railway at Louisville.

Mr. Hall: That is right.

The Court: Then the damages that follow that conversion and your efforts to save the value of the car as much as possible, are mere incidents and the subsequent events. You simply show your good faith afterwards and your efforts.

Mr. Hall: I think your Honor understands.

CARL W. WILEY, a witness sworn on behalf of the plaintiff, testified as follows:

My full name is Carl W. Wiley, and I was at the Commercial National Bank at Indianapolis on the 4th of December, 1917. This bill of lading, without the pencil notation "Dumesnil, Kentucky," was in the bank on that day. It was in the possession of the banker.

Mr. Hall: I offer in evidence a stipulation entered into between counsel for the plaintiff and defendant, concerning the out-turn of the car.

Mr. Waer: If the court please, the stipulation was entered into, and we, of course, admit the facts set forth in the stipulation. We claim that the proof offered, which is attempted to be made by that stipulation, is incompetent for the reason the damages at Memphis, or proof of damages at that point, are in no way material as far as the defendant railway company in the case is concerned.

The Court: It may be received subject to that objection.

Mr. Hall: "State of Michigan. In the Circuit Court for the County of Kent. Jay F. French & Company composed of Jay F. French and John Wallace, plaintiffs, versus the Pere Marquette Railway Company, defendant, number 25364.

The above named parties by their respective attorneys do hereby stipulate and agree as follows:

N. Y. C. car number 151473 arrived at Memphis, Tennessee, about December 18, 1917; consigned to the order of Jay F. French & Company, notify McKnight & Hill. Said car was sold by Me-



Knight & Hill to D. Canale & Company. The potatoes in the car were resorted by D. Canale & Company and it was found that all together there were 261 sacks of good potatoes in the car after the sorting had been done, and there were 39 sacks of potatoes frozen, worthless and unmarketable. The potatoes in the car were sold for \$743.85 gross. The freight on the car, which *were* paid by plaintiff, amounted to \$232.51; demurrage at Dumesnil, \$60.00; demurrage at Memphis, \$2.00; reconsigning at Grand Rapids, \$5.00; labor resorting, \$16.40; war tax, \$6.98; commission on resale, \$7.50, and that the net proceeds on this car were \$411.43.

The effect of this stipulation is that if the plaintiff took depositions at Memphis, Tennessee, such depositions would show the facts to be as hereinabove set forth, and the plaintiff may use this stipulation as to such facts upon the trial of the case as proof of the facts herein stated."

Dated this 28th day of February, A. D. 1918.

HALL, GILLARD & TEMPLE,  
*Attorneys for Plaintiff.*  
NORRIS, McPHERSON, HARRINGTON  
& WAER,  
*Attorneys for Defendant.*

EDWARD F. BAKER, a witness sworn on behalf of the plaintiff, testified as follows:

I was the agent of the Southern Railroad at Dumesnil, Kentucky, from November 1st to December 10th. I did not send this wire through that is my signature on it. I knew of its being sent after it was sent. It states the facts as I understood them at the time. I sent or caused this wire to be sent to H. E. Moseley on December 4th that car number 151473 was on the line of the Southern Railway Company rejected, and that was the fact as I understood it.

Cross-examination.

By Mr. Waer:

I have a record showing when car New York Central No. 151473 arrived at my station. I produce that record and it shows that this car was received on November 18, 1917. I know of the car being in the yard there after its receipt. Mr. Bindner sent this message and he is here. I did not write it.

Redirect examination.

By Mr. Hall:

44 This record that I have here shows when the car arrived, car number, initial, contents. I never had the bill of lading for that car and I cannot say that it was in the office of the Southern Railway at Dumesnil. My position there is local freight agent

and my duties are various. I have charge in a way of the receiving and delivery of freight shipped on all bills of lading. There is someone else in my office who has particular charge of it. That is Mr. Bindner, who is cashier. He has the same authority to deliver such shipments as I would have. I delivered such shipments in some cases.

Recross examination.

By Mr. Waer:

Besides myself there are Mr. Bindner and one other man in the depot at Dumesnil. I know about this car being taken from Dumesnil to Memphis. It left Dumesnil on December 9th. I have the record, the way bill, showing that the car left at that time. This way bill shows that the rate of freight charged on the car from Dumesnil to Memphis was 22 cents, and that was the rate that it carried from Dumesnil to Memphis. That was the rate quoted to me by the general freight office at Louisville as being the rate from Louisville to Memphis.

The Court. Have you some legal propositions you want to raise?

Mr. Waer: Your Honor is prepared to hear them now?

The Court. Yes, I am prepared. We will excuse the jury for a little while. I don't think they need to remain. You may be excused gentlemen.

Mr. Waer: If the court please, the defendant at this time, on the assumption that the plaintiff's proofs are closed with the exception of this detail as to certain expenses, moves the court to direct a verdict for the defendant on the ground that the plaintiff has made  
45 out no case. He has not shown in any way how the initial carrier or the connecting carrier were in any way negligent in the handling of the shipment. Of course, he must show that the initial carrier or the delivering carrier was negligent in handling the shipment under this through bill of lading, before he can recover against the initial carrier under the Carmack Amendment. Now, on that point, if your Honor please, I merely call your Honor's attention to the undisputed facts in the case as they thus far appear, which are that when the car was at Dumesnil the bill of lading was in possession of the Southern Railway, it being then in its office. Under those circumstances, we fail to see how the plaintiff has connected himself in any way with any negligence or wrong on the part of the Pere Marquette or the Big Four, the delivering carrier.

The Court: Just let me understand. The bill of lading which you claim was in the office of the Southern Railway, is the bill of lading which was attached to the draft and sent by the plaintiffs to the Indianapolis bank?

Mr. Waer: The testimony so shows. The original bill of lading, endorsed in blank, was seen in the office of the Southern Railroad by plaintiff's own witness, at the time he was there at the same time the car was in the yards of the Southern Railroad at Dumesnil. Our

claim, therefore, is that the plaintiff has not shown that the Big Four made a misdelivery. It doesn't make any difference what kind of a delivery they made, because the car, at the only time he identifies it, was in possession of the Southern, which also held the bill of lading which carries with the right to the possession of the car no matter in whose hands it is. Whether he stole it or whether he found it, he has a right to that car in the absence of showing that the railroad company delivered it to him, knowing that he was not  
46 entitled to it. The law provides that the railroad company must deliver a car under certain circumstances. The law provides further that it is justified in delivering a car to anyone in possession of the bill of lading unless it has notice at the time of delivery that that party in possession of the bill of lading obtained it wrongfully.

The Court: Now what have you to say, Mr. Hall?

Mr. Hall: Well, there is no showing here, your Honor—they have shown that the bill of lading, when the car arrived on the 18th of November—there is no showing that they had the bill of lading on the 18th of November or that the car was delivered to them because they did have the bill of lading, or anything of that sort. Now, if the car was delivered to them on the 18th without the production of the bill of lading and then later on they got that bill of lading, but that bill of lading is back in the bank on the 4th of December and the car is on the track at Dumesnil and the draft is unpaid, they notified us on the 4th of December that the car was on the track at Dumesnil unclaimed, and on that day the bill of lading was in the Commercial National Bank where it was sent to in the first instance, and our car was beyond the destination, and that shows on its face a misdelivery. Your Honor, further than that, it does not make any difference whether the Southern had that bill of lading or whether it didn't. Our contract, as far as we were concerned, was to have that car at Louisville, Kentucky, to have it accepted or rejected at Louisville. We made that contract with the railroad and they cannot say, well, the Southern had the bill of lading some time later and that lets us out. It was the duty of the railroad company, the Big Four in Louisville, to get that bill of lading and to keep it. It was not the duty of the other carrier or the Big Four to deliver to another carrier because the other carrier had the bill of lading. The bill of lading itself  
shows that.

47 The Court: Do I understand the rule to be that when the draft is attached to the bill of lading and sent to the bank for collection, that the bill of lading is not released until the draft is paid. Is that the rule?

Mr. Hall: Well, your Honor, I do think it is. I think if somebody stole that bill of lading out of the bank and got it out of the possession of the bank in some way and took it and delivered it to the carrier, and the carrier did not have any notice that it was a stolen bill or anything like that, if the carrier would take up the bill—

The Court: That is not the question I put to you. Isn't that the normal method of handling these bills of lading?

Mr. Hall: Oh, yes; there is no question about that.

The Court: Then how could that bill of lading get into the hands of either the Big Four or the Southern Railway without the draft first being paid?

Mr. Hall: Well, because of the wrongful act of someone else.

The Court: Well, would it be the wrongful act of the railroad or the wrongful act of the bank in delivering it to the railroad without payment?

Mr. Hall: It may be the wrongful act of the bank or the railroad. You cannot tell.

The Court: Right there is another question. If it was the wrongful act of the bank, the bank was the agent of the shipper?

Mr. Hall: No, your Honor, the bank was not the agent of the shipper.

The Court: Who was the bank the agent of?

Mr. Hall: How?

The Court: Who was the bank acting for?

Mr. Hall: The bank was the agent of the local bank here—  
48 hardly agent, your Honor, they are more than that. It is not the ordinary rule of agency that applies between the banks or that applies between banks. They are a bailee, more like.

The Court: Yes. Well, the bank was not the bailee or the trustee of the railroad company?

Mr. Hall: Oh, no.

The Court: If it was bailee or trustee, it was bailee or trustee for the shipper.

Mr. Hall: Yes.

The Court: To conserve the shipper's interest?

Mr. Hall: Yes.

The Court: And should have held the draft or order bill of lading. What is that?

Mr. Hall: What is that bill of lading?

The Court: Order bill of lading until the draft was paid. It has been intimated here rather freely by both counsel that this bill of lading was down in Kentucky. How did it get there?

Mr. Hall: Well, your Honor, that hasn't anything to do with this case.

The Court: It may have.

Mr. Hall: It cannot, and I want to tell your Honor why.

The Court: Well, now; just a moment.

Mr. Hall: All right.

The Court: If, as a matter of fact, on the face of the bill of lading, according to its terms it is provided that the railroad company is permitted to deliver that car to anyone presenting that bill of lading duly endorsed—

Mr. Hall: No, your Honor.

The Court: What are the terms? Just read that.

Mr. Hall: Well, now; that is just the whole point.

The Court: I know that is the whole point.

49 Mr. Hall: Well, that is what I want to read to you, the surrender of the original order bill of lading properly en-

dorsed shall be required before the delivery of the property. Now, the terminal carrier never required and never obtained a surrender of the original bill of lading. They never had it in their possession, and that is why it does not make a bit of difference whether the Southern Railway Company had possession of this original bill of lading or whether it did not. The language—I haven't got it here—but we have the federal bill of lading which says that the carrier is justified in making delivery of the car to anyone who will present the original bill of lading properly endorsed.

Mr. Waer: That is not the law.

Mr. Hall: Now, that is the whole gist of this case. If the Big Four Railroad Company had required the surrender of this bill of lading at Louisville, and then the car had gone on, they would have been all right, because they would have been protected if they had required it there; but they didn't do it. They never had it. They may have done this—I don't think even this is a fact, it is not my understanding of the facts anyway—but they say to the Southern, we will send that stuff on if you get the original bill of lading, and then the Southern says, "All right, we will get it," and then they get it and they hold it there and give it back to them and it goes back to the bank right where it was in the first place. The Big Four Railway Company did a wrongful act when they let that car of potatoes go beyond Louisville without the surrender of the bill of lading. They may have taken a chance on the Southern, they may have said, take that stuff and we will take a chance on it. The Southern took the chance and didn't give back the bill. That can not help the Big Four. Now, your Honor, if this bill had been surrendered as required, we would not have been in this mess, because the Big Four

would certainly have been protected. Then our action would have been gone. Now, it is unquestionably true that the bill of lading was out of possession of the bank, as far as the bank was concerned, for a while. The bank said, we nominate Mr. Kelsey, a trust officer, and allow him to take these bills of lading to show the railroad company that he had the right to inspect. They say we have been doing it for seventeen years; we have a perfect right to. Now, that is all wrong. He may have acted in good faith, and may have acted in bad faith. But the fact remains that he got the bills of lading back. He got them back because of the act of the Big Four Railroad Company in not requiring the surrender at destination, and that is the whole story. Your Honor, we have got some rights to say where our stuff shall go and where it shall not go. We know just as well as anybody else that potatoes are rejected, and when we put the destination in that bill of lading, we know they are going to be rejected. We are not going to be put down there on a little sidetrack with a six cent local rate and no recovery.

The Court: You need not discuss that proposition at all. As I have repeatedly said, the question is as to whether there was a wrongful delivery by the Big Four to the Southern Railway. Now that may become a question of fact, or it may become a question of law. It is contended by the defendant that it is a question of law,

and that the burden rests upon you to show that there was a wrongful delivery, and that you have not shown it.

Mr. Hall: Well, here is the point, your Honor. There is no showing here, absolutely not, that the railroad company had that bill of lading on November 18th—that the Southern Railway Company had that bill of lading on November 18th, when it got possession of these goods from the Big Four. Our man saw that bill of lading on November 30th, that is very true. But we have got to make a *prima facie* case, your Honor. We show a bill of lading ordering delivery of these goods to Louisville, Kentucky. We show on the 4th of December the car on the line of another railway at a different destination and the bill of lading in the bank where it was in the first place. That is a *prima facie* case, *prima facie* case of misdelivery. Now the burden is upon the railway company to show that they did make a proper delivery. I say that they cannot show it, because they did not obtain surrender of the bill of lading. That is the only right that they have got to deliver that car. Do you think, your Honor, if a fellow from Chicago ships me stuff on an order bill of lading in Grand Rapids and I wanted it to go to Bailey, and I go to the agent and say, ship it up to Bailey and I will get the bill of lading—don't you remember that that was just the case in the L. P. Thomas Company case; where A. C. Thompson wrote to the C. E. & I. Railroad Company and says, "Give Reagan brothers those goods and I will be responsible for the bill of lading," and they gave them to him and they never got the bill of lading, and on hold for the plaintiff in that case. Pure case of misdelivery. Here is another difference. The written order in that case did not protect the railroad company. How can a verbal statement that they have got the bill of lading protect — 18th and the 25th, more than two weeks after they got the car, it is still on their tracks and the bill of lading in possession of the bank. Now, your Honor cannot assume a case that the bank did anything wrong or be controlled by it. There is no evidence that they did. *The them?* It is the surrender, and it was never done. Now there is a case right square on it, your Honor, a very late case, too.

Ryder vs. Atlantic Coast Line, 186 S. W. 529 (reading case).

Now, your Honor, they may have got a defense on the merits, but we have certainly made a *prima facie* case of misdelivery, and our car, your Honor, got there on the bank did let the bills go. They were out of their possession but they got them back and the Big Four did not get the car back. That is the whole gist.

Mr. Waer: Does your Honor want to hear me? I have not very much more to say.

The Court: Well, go ahead.

Mr. Waer: If the Court please, it seems to me that Mr. Hall misconceives entirely the meaning of negotiable order bills of lading, do misconceives the law in reference to negotiable bills of lading. I have in my pocket—I happen to have a dollar bill. That dollar bill

calls for the payment of a dollar by the United States government. If I lose it or somebody steals it from me and presents that dollar, they are entitled to the dollar in silver or whatever the reserve may be. The statute has made negotiable bills of lading exactly the same as a check, a draft, or even a dollar bill. In the case cited by Mr. Hall, it was not a negotiable bill of lading endorsed in blank. Here is what the law says in reference to a negotiable bill of lading endorsed in blank, that it passes from hand to hand. I don't care how a man gets it, I don't care how the Southern Railroad got it. It got there. Possession of the bill of lading in the office entitled them to the possession of that car. Thus far the only proof is that the car was there and the bill of lading was there. Is this court going to presume that the Big Four delivered the car to someone that they knew was not entitled to it? The Big Four did not have to inquire into the ownership of the bill of lading. All the Big Four had to know was that the party to whom they delivered the car had the bill of lading. Now, whether they knew it or not does not make

53 any difference because here the evidence shows that the bill of lading was there in the office of the Southern and the car was on its track. Now counsel argues about giving the bills of lading back causing all the trouble. Well, assuming that that is true, the Big Four delivered the car to the Southern. The plaintiff's undisputed evidence shows that the Southern had the bill of lading and had the car, therefore the contract between the shipper and the carrier was completed. The delivering carrier had made delivery of the car, and if later some agent of some other railroad re-delivered those bills of lading to the bank, we surely are not to blame for that. We surely cannot hold the initial carrier for it. We surely cannot hold the Big Four, which is not a party to this suit, for that, because they have discharged their duty. What happened after that time, after delivery was made to the party in possession, is entirely immaterial. A cause of action may have arisen against some persons somewhere for letting those bills of lading go back to the bank, but that surely is not our concern. Here is a clause in reference to what these bills of lading permit a man to do; first, there is a section with reference to when a carrier is bound to deliver the bill of lading, the next section, being Section 9 of the Act of August 29, 1916, as amended, is entitled, "Persons to whom carrier may deliver." (Reading portion of the act cited.) And your Honor will notice that this bill of lading was endorsed in blank by the consignee. He put it in the hands of the bank. In that way he knew that thereafter it was a negotiable instrument which, if put in the hands of any one, would entitle that person to a delivery of the car.

Your Honor, with reference to compelling its surrender and cancellation, the only penalty is this, one of the three sections which it refers to here as subject to the three following sections, except as provided in Section 25.

54 Mr. Hall: Which section are you reading?

*was not paid there and it came back and finally it was*

Mr. Waer: Section 11 (reading section 11.) That is the only penalty. That is, the railroad company may deliver the car to

anyone in possession of the bill of lading. Then if it does not ask for the surrender of this bill, it is liable to any one who thereafter obtains the bill and who is a bona fide purchaser for value. But, of course, the plaintiff in this case is not a bona fide purchaser for value of his own bill of lading. There is the only penalty if they do not take up their bill, there is the only penalty on the Big Four for delivering this car without demanding the bill and canceling it under the statute. Now, the only proof thus far is, that when these parties next heard of the car and when they went there, the plaintiff's own witness says he went to Dumesnil and the car was there; he went to the office of the Southern and the bill of lading was there.

Mr. Hall: Not this car.

Mr. Waer: This car. That is the only testimony. Now if they can establish any *prima facie* case on that of misdelivery, I fail to see it, because the bill of lading carries with it all of the presumptions created by law that the party in possession of the bill of lading at any time anywhere is lawfully entitled to the possession of the car. Now, I don't care where this car was sent to from Louisville. When it reached Louisville it had reached its destination. At that time the Big Four was entitled to deliver it to anybody that produced that bill of lading, or who had it in their possession, even if they did not surrender it. After they did that, if they delivered the car to somebody in possession of the bill of lading, their liability stopped except as to someone who might gain possession of the bill they did not cancel in good faith and for value. That is the only liability on the Big Four, and they cannot be reached here. The Big Four did exactly what they were entitled to; the car was at Dumesnil and the bill of lading was in the office of the Southern.

The Court: Anything further on this question gentlemen?

Mr. Hall: I have something further, your Honor. Now, a word on the bill of lading, that the surrender of the original order bill of lading properly endorsed, shall be required for the delivery of the property. I want to call the court's attention in the first instance—

The Court: Let me see that statute. You had it here last night.

Mr. Hall. I have got the statute.

The Court: Well—

Mr. Hall Your Honor, first before I take up that statute I want to call your attention to the record in the case of L. P. Thomas Company which was tried before you. I take it you are familiar with the case. L. P. Thomas Company shipped the goods received from the owner and consigned to the order of A. J. Thompson of Chicago, notify A. J. Thompson, same place. Signed L. P. Thomas & Company, shipper. The car went. When the car got there Thompson wrote an order to the C. & E. I. Railway saying, "Upon arrival of car so and so, deliver the beans in the car to Reagan Bros., without delivery of the bill of lading," and the railroad company did deliver, and Thompson & Company refused to take up the draft and it was finally returned, and then the Thompson Company asked them



to send the draft to Kansas City. They didn't know anything about this delivery and they did send the draft to Kansas City and it turned back to the bank and Thomas Company paid the bank for it.

Mr. Waer: The bank held the bill of lading all the time  
56 with the draft, didn't they, Mr. Hall?

Mr. Hall: Why, until after the delivery was made just the same as in this case.

Mr. Waer: Pardon me, the bank parted with the bill of lading here before the delivery was made. The bill of lading was down there; it was not in the bank.

Mr. Hall: Well, it doesn't make any difference. And on that point I want to call your Honor's attention to the fact that there is absolutely no testimony that on the 18th day of November the Southern Railway Company had that bill of lading.

Mr. Waer: It is up to you to prove that we did not have it.

Mr. Hall: It is not up to me. Mr. Baker, the agent of the Southern, testified that on the 18th of November he didn't have that bill of lading.

Mr. Waer: That is not true.

Mr. Hall: It is very true that on the 30th of November we saw this bill of lading in the hands of Baker at Dumesnil. Four days later they were back in the bank at Indianapolis, and Baker's testimony stands that on the 18th day of November he didn't have that bill of lading.

Mr. Waer: He did not say it was not in the office.

Mr. Hall: He said that he didn't have it, that he is the agent at Dumesnil, and that he did not have the bill of lading and he could not say if it was in the office. Now that is his testimony, and you can make your argument later of you want to.

Mr. Waer: I don't want you to misstate the facts; that is all.

Mr. Hall: I am stating the facts. Now, on this Thomas case, your conclusion of law is as follows. After quoting this provision that I have read, the surrender of the original order bill of lading

57 shall be required before delivery of the property. The delivering carrier having delivered the property covered by the bill of lading in this case to Reagan Brothers on the order of A. J. Thompson Company without the surrender of the original order bill of lading properly endorsed, violated their duty. To hold otherwise would be to destroy the distinction between a straight bill of lading and an order bill of lading and make an order bill of lading no more protection to the shipper than a straight bill of lading would give; and that case was affirmed by the Supreme Court. Now between the time that we tried this case here and the time it was decided by the Supreme Court, the Supreme Court decided the case of Turnbull against the Michigan Central Railroad Company, which arose out of a shipment to exactly the same parties, A. J. Thompson. That case is 183 Mich., 213; opinion was written by Mr. Justice Kuhn. It is not necessary to state the facts because they were just the same and the Michigan Central claimed as the P. M. claim in this case, in the Thomas case, that it was ruled

ly the Nelson Grain Company case with which your Honor is also familiar. (Reading from 183 Mich., 213.)

Now that case was cited and the Thomas case in the 185 Mich., was decided on the strength of it. Now, in the case of Perketette vs. The Manistee & Northeastern Railroad Co. In that case the shipment of a car of apples on an order bill of lading was stopped this side of destination upon an order of the notify party, and the shipper recovered in that case. As far as the bill of lading, etc., was concerned, it was handled in just exactly the same manner as in this case. I tell you, your Honor, there is absolutely no question about it, the surrender is required. And that brings us to the bill of lading statute of which, of course, my brother did not read all, but just before we take up I want to call your Honor's attention to

this fact, that this bill of lading at Dumesnil, whether it was  
58 in the possession of the Southern Railway Company on the 18th of November or on the 30th of November, or during all that time or none of that time, could make absolutely no difference. That bill of lading was of absolutely no effect in protecting anybody for that car at Dumesnil. The destination of that bill of lading was Louisville. If there had been a reconsignment and the destination had been changed at Dumesnil, then that bill of lading in the hands of the Southern might have been some protection to someone. But there was no change. It was a bill of lading to a different station, taking a different rate and calling for a different destination. It was no protection to anyone at that point. This very carrier, the Pere Marquette Railway Company, when we wanted to do just exactly the same thing as they did without our knowledge and without consent and without any authority to do so, made us deliver the original bill of lading and they issued us another. Didn't we have to surrender our original bill of lading from Bailey to Louisville in order to get that car on to Memphis? There is no difference between Memphis and Dumesnil as far as that is concerned. Memphis takes a different rate, Dumesnil takes a different rate, and we had to surrender. Now, section 8 of the bill of lading act, a carrier in the absence of some—

The Court: Of the bill of lading, did you say?

Mr. Hall: Bill of lading act, general bill of lading, effective January 1, 1917. "A carrier, in the absence of some lawful excuse, is bound to deliver goods upon the demand made either by the consignee named in the bill for the goods, or if the bill is an order bill, by the holder thereof, if such demand is accompanied by an offer in good faith to satisfy the carrier's lawful lien upon the goods." Was that done? Who paid the freight in this case? We did, \$232.00;

three times as much freight as we were required to pay by our  
59 contract. They had not complied with that provision, had they? Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods, if the bill was an order bill. Did they do it? Could they do it? They didn't have the bill of lading under the undisputed evidence in this record on the 18th day of November; they couldn't do it; they couldn't make an offer in good faith, and they put it out

of their power later on to ever make a surrender of it, or to ever make an offer in good faith by giving it back. Was the Southern ready to comply with the sub-division? And in readiness and willingness to sign, if the goods are delivered, an acknowledgement that they had been delivered, if the signature is required by the carrier? They have not. Now, that is when a carrier is bound to make delivery. Mr. Waer said yesterday that we had to make delivery because the Southern held—

Mr. Waer: I didn't say they had to; I said under the next clause they might. We don't claim under the first clause where we had to make a delivery. We claim under the next clause where we were justified in making delivery.

Mr. Hall: Now, your Honor, the next clause does not mean anything by itself, or Section 9 does not mean anything by itself alone. It says subject to the three following clauses, provisions, and it says just as Mr. Waer said yesterday, that the carrier is justified, subject to the provisions of the three following sections, in delivering the goods to a person lawfully entitled to the possession of them. The Southern was not that party; it was not lawfully entitled to the possession of the goods because the surrender of the bill—under that case cited last night, a delivery by giving the goods to another carrier is a delivery—there is no question about it—before the delivery can be made, the bill of lading must be surrendered. There  
60 is no showing that they were in a position that they could surrender or anything like that or that they even had the bill of lading. They were not lawfully entitled to possession of the goods under the facts in this case. The person in possession of an order bill for the goods by the terms of which the goods are delivered to his order, or which has been endorsed to him or in blank by the consignee, or by the mediate or immediate endorsee of the consignee. Now, your Honor, this act does not change the bill of lading, which is a federal contract which was adopted after four years' investigation by the shippers and the carriers and the bankers of this country and approved by the Interstate Commerce Commission, in which they use the following language in their opinion recommending this uniform bill of lading, the one that we are discussing now. Their report is in 14 L. C. C. 696, in which they said moreover—and this is a matter of consequence—"the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee." Now, just leaving out the 10th and the 11th for the time being, if a carrier delivers goods to one—no carrier justified in delivering, the person in possession of an order bill by the terms of which the goods are deliverable to his order, where is that delivery to be made? Your Honor, supposing the Commercial National Bank of Indianapolis sent this draft and bill of lading to the First National Bank of San Francisco, and then somebody out there told the Big Four Railroad Company to send that car out to San Francisco. Do you think—and they delivered the bill of lading on that, we will say, to the carrier when they got the car to San Francisco. Do you think that that would be justification? The Union Pacific Railroad Company had the bill of lading out in San Francisco.

61 You might just as well take it to Hawaii or London or anywhere else. The delivery must be made at the point of destination. Has the railroad company any right to change our contract? This section does not say that the bill of lading can be surrendered anywhere, or that it can be delivered to the holder of the bill of lading, no matter if he be at the ends of the earth, as far as this shipment is concerned. Your Honor, our bill of lading says that this contract cannot be changed. The decision of the United States Supreme Court in this Milling Company case says that the carrier cannot change this contract, and that we cannot change it. It is elementary law that it cannot be changed. And yet they say, or their defense is, their claim is, that they can take this car anywhere if the fellow at the other end of the line holds the bill of lading. Now, it cannot be done, and this section does not say so. He must deliver to the holder of the order bill of lading at the contracted destination, and that is all. Why, what good would be our goods to us? We sent these goods to a place where we know the freight rate, we know what the situation is, we know, your Honor, that our contract right—we know that Marshall & Kelsey could have rejected those potatoes for good cause or for no cause, and we would have had to handle them; so we fixed our destination Louisville. We did not fix it out at the side track at the government camp where there is no market, where all these expenses in addition to what we have contracted for will accrue. Now, I will have more to say about that later; I say that the holder of the bill of lading must surrender the bill of lading and must be at the point of destination, and that point only. Now, Section 10 I do not think makes any difference, your Honor. There is no claim here that the carrier had any notice, and Section 10 qualifies Section 9. Now Section 11 qualifies Section 9 because the bill says subject to the three following sections: That except as provided in Section 26 and except when compelled by legal process, if a carrier delivers goods for which an order bill has been issued, negotiation of which would transfer the right to the possession of the goods—now listen—and fails to take up and cancel the bill——

The Court: Where is that provision?

Mr. Hall: Section 11.

The Court: Go on.

Mr. Hall: Have you found it?

The Court: Yes.

Mr. Hall: If the carrier delivers the goods and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchased such bill, whether such purchaser acquire title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made by the person entitled thereto.

Now, your Honor, there is absolutely no question, and the record is uncontradicted in this case that on the 18th day of November, when the Southern got this car, that this bill was owned by the Grand Rapids Savings Bank, that they had paid good value for it, full value therefor, and there cannot be any question but that they were

the owner in good faith and for value on the 6th day of December, when the carrier by reason of their unlawful act had put us in this position and where we, in order to try to do all we can to save this perishable property, we go to the bank and we give our check for \$1,086.75 to the bank. Didn't we give value for it? Didn't we do it in good faith? Why not? Your Honor, I said yesterday that our good faith in this transaction could not be questioned, and we did it in good faith for the purpose of making the loss as light as possible.

We stood in just as good a position on the 7th day of December when we paid the bank the entire amount of that amount as  
 63 the bank did, when on the 3rd day of November they gave us \$1,086.75 for it. Now, your Honor, remember this, that according to this section, it doesn't make any difference whether we did that before or after the delivery of the goods by the carrier. Get that language again: Makes delivery and fails to take up and cancel the bill. It is just another way of saying, surrender. Section 12 qualifies Section 9: That except as provided in Section 26 and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill has been issued and fails either to take up and cancel the *the* bill. Sub-division B, it is not necessary to read it. I don't believe, and there is the law under Section 11, if you deliver all the goods and fail to take up and surrender the bill, under Section 12, if you deliver part of the goods and fail to take up and cancel the bill. Now, there is some more. Section 23, your Honor, that if goods are delivered to a carrier by the owner or by a person who is actually conveying the title to them or a purchaser for value, in good faith, or by the owner, and an order bill is issued for them, they cannot thereafter, while in possession of the carrier, be attached by garnishment or otherwise or be levied upon by execution, unless the bill first be surrendered, the carrier shall in no case be compelled to deliver by the court until the bill is surrendered to him or impounded by the court. That is under legal process, your Honor. The carrier must not give up the actual possession of the goods until the bill is surrendered or is in the hands of the court. Now that shows what the bill of lading act means. Instead of detracting from the language of the bill of lading itself, which is, as I say, a federal contract—the United States Supreme Court says it is a federal contract—instead of the bill of lading being authority for this wrongful act on the part of the

64 carriers, it shows all the way through that the word "surrender" in the order—used in the order bill of lading—means just exactly what it always did, and it means the same under that act as it did under the decisions before. It does not make any difference, your Honor, what might happen if the Big Four Railroad Company got the surrender of their bill of lading, but its duty was—it was the only defense that that carrier can make, is to take up and cancel the bill. The Big Four didn't do that. They took our goods to another destination. They had no jurisdiction for it, because the bill of lading is not at Dumesnil. Now, I want to read to your Honor, from 10 Corpus Juris, 1070, p. 256; also page 262 (reading from same).

Now I say, your Honor, that the law has been, is now under the federal bill of lading act, just as it always has been. There isn't any

question in my mind but what if the Big Four had at Louisville taken this bill of lading, whether they got it from the Southern agent, or whoever they got it from, if the Big Four had taken that bill of lading at Louisville before or at the time of making delivery to the Southern Railway, there would have been no question of liability on the initial carrier in this case. But absolutely the only thing that can excuse this carrier is the act in taking up and cancelling that bill at the time of the delivery to the Southern, and they have not done it.

Now, your Honor, we have shown by this witness that on the 18th day of November he did not have the bill of lading, that is, regardless of the fact that the bill of lading must be delivered at Dumesnil, and even the Southern didn't have any bill of lading under this record until the 18th day of November. They did have it on the 30th day of November. How did they get it? Nobody knows; the record does not show. They gave it back. What for? Nobody knows. The record does not show, it is entirely out of it.

There is no showing how they got those bills of lading, and what they gave them back for. They might have been the agent of the bank in holding those bills of lading. There is no showing here, your Honor, that they are holder of those bills of lading in good faith or how they got them, or anything of that sort. There is no showing that the Southern Railway Company made a delivery of these cars on these bills of lading or did anything in respect to them. There is no explanation of them. As I say, they might have been the agent of the bank, and that is why the law says the bill must be surrendered. Now Marshall & Kelsey might have stolen those bills of lading from the Commercial National Bank; the bank might have committed fraud and all that sort of thing, and the Southern got the bills from Kelsey. That may all be true. If they did, they have taken those bills of lading to Louisville and given them to the Big Four, and the Big Four had taken them up and cancelled those bills, the Pere Marquette Railroad Company and the Big Four would have been through with it, and if we had a right of action it would have been against somebody else. But until they do, the railroad company is liable, no matter what they had or how they had it. They did not follow the law; they did not surrender it; and they must surrender it. The surrender shall be required before there is any delivery of the property. Now, there isn't any question but what the delivery to the Southern—the Southern was a stranger, it was a railroad that operated this siding, and that principle was laid down in the case of *Livingston vs. —*, where the court held that the delivery on a private siding with bonded indemnity, was an actual delivery and acceptance, and then this case that I read you last night was exactly the same thing, it was a delivery. And I want to call the court's attention to this case of *Mills*, which is just exactly this case, a carload of flour ordered shipped, bill of lading in the bank and all that sort of thing, and the railroad company, they required the payment of the draft or surrender of the bill of lading which were ultimately returned to the milling company (Reading case from brief). If the Big Four had placed it on the sidetrack of Marshall & Kelsey, at Louisville, if they had a warehouse or sidetrack there, it

would have been a misdelivery. Instead of that they gave it to another railroad without surrendering the bill of lading. That is what the United States Supreme Court says.

Mr. Waer: If the court please, I want to add just a word, and that is this: Mr. Hall seems to misconceive entirely the duty of the plaintiff and the defendant in a lawsuit, misconceives entirely the claim of the defendant. Now, he referred to those cases that he cites. He says they all involve bills of lading with drafts in the bank, and all that sort of thing. Now he may be trying to cover a multitude of sins with all that sort of thing, but in none of those cases did the bill of lading leave the bank, and in none of those cases was the bill of lading in the hands of the person to whom the car was delivered. Now, as to the burden of proof, this case, your Honor, is a case in its last analysis amounting to this: The plaintiff claims there was a misdelivery of this car by the Big Four at Louisville. Now the burden is upon him to show a misdelivery. We are not called into court convicted of wrong and compelled to prove that we did not do it. The burden is upon him to show that there was a misdelivery of that car by the Big Four to the Southern Railroad. Now, in order to establish that burden, he must show that we delivered that car to a person not in possession of the bill of lading endorsed in blank. Now

67 he has not shown that we delivered that car to a person not in possession of the bill of lading endorsed in blank, and not having shown that, he cannot recover against this defendant as initial carrier, because he has not shown that there was a misdelivery. Leaving aside all the facts that he brought out, with reference to the bill of lading being in the office of the Southern, and the car being there, if he had not brought that out the burden still is upon him to show that the Big Four delivered that car to someone who did not have possession of the bill of lading. It does not make any difference whether the carrier surrenders the bill of lading or not, as far as the plaintiff is concerned. The plaintiff is not a purchaser for value and in good faith without notice of this bill of lading. This plaintiff in this case issued the bill of lading. I never heard of a man who could be a bona fide holder of his own negotiable instrument, especially when he holds it and acquires it with knowledge of all the circumstances. Your Honor would plainly see that that provision with reference to a bona fide holder protects someone who, without knowledge that the car has been turned over to someone without the cancellation of the bill of lading, buys the bill of lading and then goes to the railroad company and says, "Here, I purchased a negotiable instrument, a draft or a check or a bill of lading, endorsed in blank. I bought it of Jones; I had no knowledge of anything that had happened to that car. On its face it provided that I should be entitled to a car of potatoes, therefore I am a bona fide holder, I have paid my money without knowledge of the facts; now you turn the car over to me." That is the only case in which the statute imposes liability upon the railroad company for the delivery of the car to the person without surrender and cancellation. Now, Mr. Hall tells about sending this car to San Francisco. That is



precisely our position. We don't care where the Southern Railway Company sent it to. If the Big Four delivered that car to the person who had the possession of the bill of lading, we don't care whether the Southern took that out to San Francisco or Honolulu. We had fulfilled the law. Mr. Hall speaks about this law being approved by the Interstate Commerce Commission. In 1916 Congress reenacts this act, and says that the only penalty attached for failure to cancel this bill of lading, is, that it shall become liable to the bona fide holder. That contract is simply a contract passing from hand to hand that entitled anyone who had it to the possession of the car. He doesn't have to deliver it up. If he doesn't deliver it up, then the statute steps in and says there is a further liability to a bona fide holder who acquires it. Their claim is that there was a misdelivery at Louisville. It is not our part to show that it was not delivered at Louisville, when we are called upon to defend. He must show that we delivered that car to someone who did not have possession of the bill of lading.

Mr. Hall: On the fact that we have made a *prima facie* case, *Eldest on Railroads*, Sec. 17, 181, says: "It is well settled that the plaintiff whose goods are lost or injured during transportation, will have made out a *prima facie* case of Liability against the carrier in whose custody they were at the time of the loss, when he proves that the goods were received by the carrier in good order and that the carrier failed to deliver them according to his undertaking."

Mr. Waer: In answer to that I might say that there was not any damage to the goods at the time we delivered them.

Mr. Hall: We have shown that the goods were delivered in good order, and we have shown that they were delivered at Dunesville.

Mr. Waer: Now you show that we did not deliver them at Louisville to someone who was entitled to them.

Mr. Hall: All right. I will show it. You did not deliver them to anyone at Louisville who had a right to the goods, because you didn't take up and cancel your bill.

Mr. Waer: That is a matter that we differ on and which your Honor will have to decide. I would like to have your Honor read very carefully the words of that act which are the last words of Congress and which override everything else.

Mr. Hall: Your Honor, it is the whole, not one part.

The Court: I think I will hear the conclusion of the testimony in this case. I will not pass upon the construction of that statute now. I will reserve it.

Mr. Waer: An exception of course follows the ruling of the court as a matter of course.

Mr. Hall: We have no further testimony, your Honor.

The Court: I was wondering, just before you pass that, on this subject of damages I am not entirely clear as to whether or not there ought not to be something showing as to the value of this car, either at the place of shipment or at the place of delivery, there being some testimony as to the reasons why the potatoes were rejected which may bear upon the question of value. I am aware of the case you



cited, the flour case, where it was rejected because some of the flour had been wet, and there it probably appeared that the flour was all right when it was shipped, but I think there ought to be some sort of showing here on that question in order to enable the plaintiff to recover the purchase price, the invoice price. I am not sure about that. I just make that suggestion.

Mr. Hall: Yes, my opinion is at this time there does not need to be, your Honor. It may come in as a question of rebuttal, but as the proof stands there is no showing as to any condition.

The Court: All right; go ahead, Mr. Waer.

JAMES L. BINDNER, a witness sworn on behalf of the defendant testified as follows:

Direct examination.

By Mr. Waer:

My name is James L. Bindner and I live at Louisville, Kentucky where I am employed by the Southern Railway. I have been employed at Dumesnil, Kentucky, that is the cantonment camp which has been spoken of as being about six miles from the city itself, during the last six or eight months. I started working there on July 1, 1917, and my official capacity was that of cashier. I have heard mentioned during the course of this trial New York Central car number 151473, and first heard about this car from the original bill of lading, which was marked Exhibit "B" yesterday. The ink notation was not on it when I saw it the first time.

Q. Now, when did you first see that original bill of lading marked Exhibit "B"?

A. Why, I would say about the 12th or the 13th.

Q. Of what month?

A. Of November.

Q. Now, how do you fix that time in your mind, Mr. Bindner?

A. Well, because the car arrived on the 18th, and I had the bill of lading prior to that time several days.

Q. Who turned the bill of lading over to you, Mr. Bindner?

A. Mr. Kelsey.

Q. Of the firm of Marshall & Kelsey?

A. Yes, sir.

Q. Whose name appears upon the bill of lading?

A. Yes, sir.

Q. Now, after this bill of lading was turned over to you about November 14th or 15th, did you do anything in the way of communicating with the Big Four Railway Company, which is named on the bill of lading as the terminal carrier?

A. No, sir; I did shortly after that—about the 16th.

Q. What did you do about the 16th?

A. I called the Big Four, the car clerk, Mr. Smith, and he advised me that the car—

Q. You called Mr. Smith of the Big Four, car clerk; did you know him being the car clerk of the Big Four?

A. Yes, sir.

Q. You talked with him on that day?

A. Yes, sir.

Q. What did you tell him?

Mr. Hall: Object to it as incompetent, irrelevant and immaterial, and hearsay.

Mr. Waer: It is not offered for the purpose of providing the truth of the statement, but for the purpose of showing what the witness said.

Mr. Hall: It is incompetent; self-serving statement.

Mr. Waer: It is not hearsay.

Mr. Hall: Well, it is a self-serving statement. The plaintiff isn't there, it was not in the presence of him, it is hearsay as to the plaintiff, it is a talk between him and the agent of a stranger on the bill of lading.

Mr. Waer: If your Honor please, we surely have a right to show how we made the delivery of this car and to whom and under what circumstances.

Mr. Hall: Your Honor, they haven't any right to show anything but the manual surrender of the bill of lading, and any talks that they had or anything like that, are incompetent, irrelevant and immaterial, and I ask to have the previous answers of the witness stricken out under my former objection and object to this question.

The Court: I don't see on what ground the conversations between this witness and any agent of the Big Four could be held as competent under the hearsay rule.

Mr. Waer: If the court please, we are not trying to prove the truth of what he said to the agent at all. We are trying to establish what he said to the agent of the Big Four, and then later to show that the Big Four, after being told that, delivered his car to the Southern Railway.

The Court: I cannot see the distinction that you are seeking to draw between the truth of the matter by hearsay testimony. That is the purpose of the hearsay rule.

Mr. Waer: If the court please, assuming that his answer would be a certain thing, I am not trying to prove the truth of what he said them at all. I am merely trying to show what he said, not to prove the truth of what he said, but that he said it. That surely is competent, and does not come within the hearsay rule. That is an exception to the hearsay rule, because we are not attempting to establish the truth of the fact which the man may have stated.

Mr. Hall: How have we got any opportunity to disprove it? You are down there at Louisville and Dumesnil and it is between two parties. We haven't any chance to cross examine or anything.

The Court: Well, I think I will have to be convinced before I will permit that testimony to be given. I don't think—

Mr. Waer: Does your Honor have any work on evidence?

The Court: Yes, a number of them.

Mr. Waer: Your Honor, paragraph 303 of this work on Evidence—

Mr. Hall: What work?

The Court: Jones'.

Mr. Waer: Burr W. Jones. He is an unknown author to me, but I was so sure of the rule that I will read it without glancing over it myself. "It does not follow because the writing of words in question are those of a third person not under oath, that therefore they are to be considered as hearsay. On the contrary, it happens in many cases that the very fact in controversy is whether such things were written or spoken, and not whether they were true; and in other cases such language or statements whether written or spoken, may be the natural or inseparable concomitants of the principal fact in controversy. On this principle, statements which may have been to a third person may be material for the purpose of showing what knowledge or information he had respecting a given subject, when such knowledge or information is material to the issue." And then it speaks of, of course, the various kinds of actions in which it might arise. This work, I notice, states the rule, but does not enter into any discussion. That is the rule upon which we rely.

The Court: Well, take the answer.

Mr. Hall: All this testimony may be under my objection and exception?

The Court: Yes, it may be so considered.

A. I told Mr. Smith to let the car come on out; that I held the bill of lading.

Q. You told him that you had the bill of lading?

A. Yes, sir.

Q. Did you actually have it at that time in your office?

A. I did.

Q. Did the car arrive at Dumesnil after this time, and if so, when; and do your records show it?

A. Yes, show that it arrived on the 18th.

Q. Can you point to your records? There is the record right there.

A. Show that this car arrived at nine A. M. November 18th.

Q. Did you say anything else to Mr. Smith with reference to the bill of lading except that you had the bill of lading?

A. No, sir.

74 Q. Did Smith—withdraw that. State whether or not you said anything to Smith about what Kelsey had told you with reference to this bill of lading?

A. Not a word.

Q. State whether you had this bill of lading in your office the day the car arrived there?

A. Yes; I did.

Cross-examination.

By Mr. Hall:

Q. How do you know the day you got that bill of lading?

A. I said prior to the 18th.

Q. I say, how do you know when you got it?

A. How do I know when I got it?

Q. Yes.

A. Why, I got it before the car came out or I would never know the car was in the Big Four yards.

Q. That is the way you fix it, is it?

A. I said prior to the 18th, I said probably.

Q. Where is your billing on that car?

Mr. Waer: You mean the billing out?

Q. Billing out from Louisville, the Big Four billing or the way-bills?

A. Inbound? Here is a copy of it. This is the office copy. That is the original.

Q. This is the Big Four?

A. Yes, sir.

Q. Is Mr Smith here?

Mr. Waer: Yes, sir.

Q. What day did you talk with Mr. Smith?

A. About the 10th.

Q. Well, how do you know?

A. Because the car came out two days following.

Q. Yes, there is a charge for telephones from Dunesail to Louisville, are there not?

A. Yes, sir.

Q. Where is your telephone record for toll charges on that, Mr. Waer?

A. In the superintendent's office.

Q. Did you bring it up?

A. No, sir.

Q. Is it here?

A. No, sir.

Q. How many bills of lading did you get when you got this one?

A. Several of them.

Q. How many?

A. Oh, I will say five or six probably.

Q. You got all the bills of lading that were delivered on these cars?

A. Yes, sir.

Q. Isn't that true?

A. Yes, sir.

Q. Did you get them all before the cars got there?

A. Some I did and some I did not.

Q. But you are sure that you got this one before?

A. Yes, sir.

Q. And yet you have not—you did not make any record when you got it?

A. No, sir.

Q. Who made this change on this Big Four way-bill, erasing Louisville and putting Dumesnil, Kentucky, and Southern Railway on?

A. The Big Four.

Q. It came to you that way?

A. Yes, sir.

Q. You don't know where it was put on?

A. No, sir.

Q. You don't know when the car got to Louisville?

A. No, sir.

Q. Kelsey gave you this bill, didn't he?

A. Yes, sir.

Q. And he gave you others when he gave you this?

A. Yes, sir.

Q. And he told you that he handed you those bills, that he gave them to you to show that he had the right to inspect those potatoes?

A. He gave them to me to keep for him.

Q. To keep for him?

A. Yes, sir.

Q. Well, what were his detailed instructions to you?

A. Why, he had several bills of lading, five or six different times, sometimes one, two, three, and he came in the office and asked me—he had a whole lot of stuff in his pockets, and I reckon he knew the value of order notify bill of lading, and so he asked me to keep them for him, and so I did; I took them and clucked them in a drawer.

Q. And that is the way you held them all this time?

A. Yes, sir.

Q. And they were in your charge all the time?

A. I was holding them for him.

76 The Court: Weren't you holding them for the Southern Railroad?

A. No, sir.

Q. How do you know Mr. Conger, or you saw him down in Louisville?

A. Yes, I met him down there.

Q. And you had several talks with him?

A. Yes, sir; at times.

Q. And you told him—one time he asked you how they could bring these cars out here without the bills of lading, didn't he?

A. I don't now as he did.

Q. And you said—I will ask you if this was not on the 24th or 26th of November?

A. I couldn't say.

Mr. Waer: If the court please, we object to that as being immaterial to the transaction. If it was on that day, it had nothing to do with the car in question after its delivery by the terminal carrier.

The Court: This is touching upon the credibility of the witness; is that it?

Mr. Hall: Yes, as to the testimony that he has already given.

The Court: Take the answer.

A. I don't know as I said a word to him nor what day; I couldn't say.

Q. And didn't you tell him at that time that you had just that morning received a whole bunch of bills of lading from Kelsey?

A. I don't know as I did that morning.

Q. Well, do you know whether you did or whether you did not?

A. No, I do not.

Q. Now, as I understand you, when you got this bill of lading you held it for Mr. Kelsey at his request?

A. Yes, sir.

Q. Did he tell you to call up the Big Four?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. And did he tell you that you had the bill of lading—did he ask you to tell them that?

A. I told them that I had the bill of lading.

Q. No, but did Kelsey tell you to tell them that you had it?

A. No, sir; he did not; I knew I had it.

Q. Well, at the time you called the Southern or at the time you called the Big Four, you held that bill of lading from Mr. Kelsey?

A. Yes.

Q. And you always held it for Mr. Kelsey?

A. Yes.

Q. And when you delivered it back, you delivered it to Mr. Kelsey?

A. Yes, sir.

Q. And for no other purpose?

A. For no other purpose.

Q. And you did not hold it at any time in your capacity as an agent or employee of the Southern Railway?

A. I did not; no, sir.

Q. When you ordered or when you told—strike that out. Well, how did you come to tell the Big Four that you had the billing anyway? Didn't Kelsey ask you to do that?

A. Yes, sir.

The Court: One question at a time.

Q. All right. Well, did Kelsey tell you to tell the Big Four that you had the billing?

A. The bill of lading?

Q. Yes.

A. No, sir.

Q. He did not?

A. No, sir.

Q. You did that on your own hook?

A. Yes, sir.

Q. How did you come to do it?

A. Because the car was overdue and I looked at the routing on the bill of lading and it was routed Big Four, and I called Mr. Smith.

Q. As long as you had it, what difference did it make?

A. It would make a whole lot of difference when the government needs the potatoes.

Q. Well, had the government told you that they needed the potatoes?

A. They always need them.

Q. Well, then were you acting in rather the capacity of kind of helping the thing along to get the car out there? You knew the government needed potatoes?

A. Yes.

78 Q. Because you knew the government needed potatoes?

A. Yes, sir.

Q. And you just wanted to let them know, as a matter of information, that you held the bill of lading?

A. That I held the bill of lading so that the car would not be delayed.

Q. And that you held it for Mr. Kelsey?

A. No, sir.

Q. Well, you didn't tell him the entire facts?

A. I told him I had the bill of lading; that is all.

Q. Well, you were talking then, in your personal capacity or as agent—

A. Not as agent; I was not agent.

Q. Well, as cashier?

A. Yes, sir.

The Court: Well, wait a minute. I don't understand that. Were you talking as cashier of the Southern Railroad when you notified the Big Four?

A. Yes, sir.

Q. You didn't hold the bills as cashier; you didn't hold this bill of lading as cashier?

A. I know I didn't.

Q. Well, you treated Kelsey as the owner of this car, didn't you?

A. I thought I did; yes, sir.

Q. Because he had the bill of lading?

A. Yes, sir.

Q. And you were holding it for him?

A. For him.

Q. And there were some charges accrued on the car?

A. Car service.

Q. How much were the charges?

A. \$4.00 on this car, if I remember.

Q. What?

A. \$4.00 on this car.

Q. Isn't it \$6.00?

A. Well, look here.

Q. And that was car service between what dates?

A. Well, that is something that I didn't take care of. That happened at Louisville.

Q. Well, aren't the dates there when it was placed?

A. The dates are on here but I am not supposed to know anything about those dates. All I know is to collect \$4.00 car service, whether it be two days or whether it be four days.

Q. That is the official record of the Southern Railway?

A. No, sir; that is the Big Four. You see that C. C. C. and St. L. That is something of Mr. Smith's.

Q. Well, was this for car service at Dumesnil?

A. No, sir.

Q. At Louisville?

A. Yes, sir.

Q. Did you personally deliver the bills to Mr. Kelsey?

A. Yes, sir.

Q. At his request?

A. Yes, sir.

Q. Simply came in and asked for them and you had been holding them for him and you gave them back?

A. Yes, sir.

Q. And when you called Smith up, you simply acted out of your own volition, knowing that the government wanted the potatoes and you thought they might be in the car?

A. Yes, sir.

Redirect examination.

By Mr. Waer:

Q. You didn't tell Smith anything about the deal with Kelsey, did you?

A. Not a word.

Q. What was there about this car demurrage that accrued at Louisville?

A. He said that there was \$4.00 car service on the car, and I told him I would take care of the car service, I would assure him that he would get it.

Q. Did Kelsey come into the office after you talked with Smith?

A. Yes, sir.

Q. Say anything to him about that car demurrage?

A. Said something to him before.

Q. When was that?

A. Why, he came in and I told him there was car service on it and he went in and paid it that day.

Q. He went in at Louisville and paid it?

A. Yes, sir; that afternoon and got this receipt.

Q. When you talked to Smith, you did not mention Kelsey or anything about how you had the bill of lading, but merely that you had the bill of lading?

A. Yes, sir.



80 Q. Did he say he would send the car out if you had the bill of lading?

A. Yes, sir.

Recross-examination.

By Mr. Hall:

Q. I want to offer some of these papers in evidence. What does this warehouse receipt mean, Mr. Bindner?

A. Why, that is an office copy of the original way-bill.

Q. Just wrote it on that kind of warehouse paper?

A. Yes, we make four copies of every way-bill that comes in the office.

Q. What I was wondering was, what was the significance of the words "warehouse receipt"?

A. Warehouse receipt is a receipt for the goods that the consignee should sign upon delivery.

Q. Now, as I understand you, under this demurrage bill the Big Four made out this bill and sent it out to you to collect from Kelsey?

A. They sent it to me. Now, who made it out, I could not say, but it is on a Big Four letter head.

Q. And you received that from the Big Four?

A. Yes, sir.

Mr. Hall: I want to read that into the record.

Mr. Waer: Let me see it.

Mr. Hall: Haven't you seen it?

Mr. Waer: No. Now, Mr. Bindner, you didn't collect this bill?

A. No, sir.

Mr. Waer: Then I object to its admission in evidence or referring to it.

Mr. Hall: Now, there is another paper that goes with it to make it competent. The Big Four—I want to show it for the purpose that this witness, the Southern Railway agent got it from the Big Four Railway Company.

The Court: Well, go on.

Mr. Hall (Reading paper): The Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Car demurrage bill number

54, Marshall & Kelsey to the Cleveland, Cincinnati, Chicago & St. Louis Railway Company, debtor. For car demurrage

81 charges as per following itemized statement—I will just read

the part referring to this car, there is another car on here—well,

maybe I had better read it all—initials N. Y. C. number 151473,

contents pots. Number 1 arrived, date 11/9; hour, 6:35 A. M.;

number 2, notice given. Date 11/10; hour 12 noon. Number 3,

ordered. Date 11/4; hour 3 P. M. Constructively placed, no

information; actually placed, no information. Released, no infor-

mation. Amount \$4.00. L. & N. number 4890, ditto mark, pota-

toes. Number 1 arrived.

Mr. Waer: Now, if the court please, I object to that. That is another car.

Mr. Hall: I know it is. That is the whole document. I don't claim anything except for this one car.

Number 1, arrived, date 11/11; hour 2:55 A. M. Number 2 notice given, 11/11; hour 12 noon. Number 3 ordered. 11/14—that is represented by ditto marks placed before 11/14; hour 3 P. M. Nothing under "constructively placed"; nothing under "actually placed"; nothing under "released." Amount \$2,00.

Q. Now, this paper that I show you is what?

A. I couldn't say what that is, I didn't make it out.

Q. Well, is this something that came to your attention?

A. That is something that came to me by train mail.

Q. From the Big Four?

A. From the Big Four, yes, sir.

Mr. Hall: I offer that.

Mr. Waer: Let me ask a question before that goes in. This was a bill to your railroad for \$6.00 for the payment of that demurrage?

A. Yes, sir.

Mr. Waer: They billed you that because you had agreed to stand the demurrage?

Mr. Waer: You told Mr. Smith you would guarantee the payment of that demurrage?

A. I did, yes, sir.

Mr. Waer: I object to it as having nothing to do with the issue in the case.

The Court: Let it stand; let it be received.

Mr. Hall (Reading paper): 11-15-17. C. C. C. & St. L. Ry. Agent Southern Railway, Dumesnil, Kentucky, date 11-15, pro 34. Car number 151473 amount \$6.00. Agent Southern Railway. In this, that I have read so far as typewritten—this is in writing in red ink: Agent Southern Railway. Mr. Kelsey called at this office today and paid this amount of \$6.00. Please cancel bill mailed you last evening.

Witness (continuing): This paper is signed by A. Zimmerman, Agent of the Big Four and C. & O. at Louisville. It is dated December 4, 1917.

Q. (Showing witness paper.) Now, I call your attention to Big Four way-bill and ask you if that is the way-bill upon which this car moved from Louisville to Dumesnil?

A. Yes.

Mr. Waer: If the court please, we object to all of this testimony as being incompetent against the defendant in this case, because that was after the delivery of the car at Louisville and after our liability had ceased as initial carrier.

The Court: Go ahead.

Q. I wil ask you if this car, moving under this billing was not still consigned to the order of J. F. French & Company?

A. Yes.

Q. And not to you?

A. Not to me.

Q. Or did not move directly to you, either in your capacity as agent or in your personal capacity?

A. No, sir.

Mr. Hall: I offer this in evidence.

Mr. Waer: Object to it for the same reason as given to the testimony concerning it.

The Court: Let it be received.

83 Mr. Hall: The Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Carrier issuing waybill, P. M. Station, Bailey; State, Michigan. To station, Louisville, State, Kentucky. Then the words Louisville and Kentucky—no, the word Louisville is crossed out with red ink, and over that is written in red ink the word Dumesnil, Kentucky. And under that is written, Southern Railway. Car initials and number 151473, N. Y. C. Date, 11-3-17. Number 8, via Benton Harbor. Another line, via Big Four. Follow name of shipper, point of shipment, original car, connecting carrier and reference; way-bill reference, J. F. French Company. Consignee, destination, marks and routing beyond destination of way-bill. Order J. F. French Company. Notify Marshal & Kelsey, care of Capt. Bernard, Commissary, Camp Zachary Taylor, allow inst. certified W. T. Articles and conditions, number of packages, 300; articles, potatoes. Weight 45,000 pounds. Rate and tariff number 24½.

Q. What is that?

A. Southern Railway.

Mr. Hall: Southern Railway, 6. Total rate 30½. Freight charges \$126.00. Advances in detail, \$11.25. First junction, \$11.09; second junction, \$11.10; C. C. C. & St. L., \$99.00. Southern \$27.00; \$126.00.

Q. Now, is this a part of the files of the Southern Railway Company?

A. In the auditor's office, yes. No, sir—yes, that goes to the auditor's office at Washington. Yes, that is the original way-bill.

Q. Now, Mr. Bindner, supposing that this car had been consigned to the order of J. F. French & Company, Dumesnil, Kentucky, notify Marshall & Kelsey, care of the commissary, and shipment had been made upon an order bill of lading and draft attached and sent to the bank. Now, we will presume that Kelsey went to the bank and actually paid the draft and got the bill of lading and came down to you and delivered the original bill of lading to you, in  
84 your capacity as agent for the Southern and took the car and unloaded it. In other words, that there was no question about delivering or anything of that sort. Now, would you have this way-bill?

A. Yes, sir.

Mr. Waer: Just a minute. I move that that be stri-ken out. He has answered. I move that the question and answer be stri-ken out.

Mr. Hall: No, he has not. Well, I haven't got this question out.

Mr. Waer: Well, don't answer it until I get my objection in.

Mr. Hall: All right; the word "yes" may be striken out.

Q. And he has paid the freight, we will assume, and you have given him a receipt for the freight. Now, I will ask you what you could do with that original order bill of lading and this way-bill?

Mr. Waer: Wait a minute. If the court please, we object to that as being so clearly incompetent that no reason need be given for it, what might be done under certain circumstances is not at all material as to what was done in this case under the facts and the law arising out of this case.

The Court: What is the purpose of that?

Mr. Hall: It is the purpose of showing the proper way of handling shipment moving in the usual course.

The Court: Well, if the question is framed properly I think it is proper to show that fact. Whether this question would show it or a proper question to show it, I won't say.

Mr. Hall: Do you object to the form of my question, Mr. Waer?

Mr. Waer: I object to the form of all of it as incompetent.

Q. And substance. All right, I will withdraw it. I will ask you, Mr. Bindner, if it is not a fact that when you actually made delivery of a car shipped on an order bill, you get the bill, do you not?

A. On the order bill or an order notifying?

Q. On an order modifying when you actually make delivery.

Mr. Waer: The same objection.

Mr. Hall: We are talking now about the ordinary course where there are no complications.

Mr. Waer: The same objection.

The Court: Well, go ahead.

A. Why, when the car is accepted on an order notify, yes, which is allowed inspection, comes in and turns over the bill of lading to be as cashier or agent of the railway company, it should be cancelled.

Q. And you cancel that by asking a notation upon the bill itself?

A. Upon the bill of lading.

Q. Yes, I mean upon the bill of lading itself.

A. Yes, sir.

Q. Any particular form?

A. We have not a form in our station, but usually there is a stamp.

Q. Yes, I see. Now, when the bill is surrendered, you cancel the bill, the bill of lading, and the freight has been paid; what do you do with the way bill and the original order bill of lading?

A. Why, the way-bill is reported and run through the accounts,

and mailed to the auditor's office. This is pinned to the pro, like the copy you have.

Q. And kept there?

A. In our office.

Q. After it has been cancelled?

A. Yes, sir.

The Court: What is it that has been kept after it has been paid?

A. The bill of lading, order notify bill of lading.

Q. Attached to the pro, which is that?

A. Expense bill.

86 Q. Pro, expense bill. Now, who in your office collected freight on shipments coming in?

A. Either Mr. Baker or I.

Q. Now, Mr. Kelsey at one time gave a check for the freight on this car and some other cars, did he not?

A. On this car?

Mr. Waer: If the court please, we object to that for the same reason already stated, incompetent as affecting the defendant in this case, the defendant having been discharged.

The Court: Well, go on.

A. This car was billed out, rebilled.

Q. Yes, I know; but before that.

A. He paid a check on several cars, yes, sir.

Q. And included this car?

A. Well, I will have to look to see.

Q. Can you look?

A. I don't know as I have that record here.

Q. All right, go ahead and look.

A. Have you got the forwarding way-bill?

Mr. Waer: You mean when this car moved out?

A. Yes.

Mr. Waer. Is that the bill? (Showing paper.)

A. This charge was unpaid, billed out as advances.

Q. I will ask you if at one time along before the last of November or the first of December, Kelsey did not give you a check for \$1,800 to pay for the freight on this car with some other cars, and that check was sent to the bank and returned "no funds"?

A. He didn't pay on this car or we would never have billed that out.

Q. Well, he did give you a check for \$1,800, or thereabouts for freight on some of these cars, and the check was returned "no funds," isn't that a fact?

A. Not to me.

Q. You haven't any knowledge of it?

A. Never came in the office that I know of.

87 Q. You don't have any recollection of any such transaction?

A. Not coming back, no, sir.

Redirect examination.

By Mr. Waer:

Q. Now, just one question Mr. Bindner. Mr. Hall asked you about the cancellation of these bills of lading, after the freight was paid and the car was delivered. Do you, as a matter of fact, cancel them all?

A. No, sir.

Q. Haven't—have you got some in your files that are not cancelled?

A. Yes, I have got some here.

Q. You showed me ten of twelve when I was there?

A. Yes, sir.

Recross-examination.

By Mr. Hall:

Q. Your instructions are to cancel them?

A. Yes, sir.

Q. And when you don't cancel them, you are not carrying out instructions of your employer, are you?

A. Clerical error.

JOHN F. SMITH, a witness sworn on behalf of the defendant, testified as follows:

Direct examination.

By Mr. Waer:

My name is John F. Smith and I live at Louisville, Kentucky, my occupation being trackage clerk for the Big Four Railroad.

I have heard of car N. Y. C. number 151473 before coming here, and the first record that I have in the files of the Big Four concerning it shows when its arrival was recorded. This is a carbon of the train sheet that consists of the train that carried this car, and this is accompanied with the billing on all the cars that were in the train. This document shows that the time of arrival of the car at Louisville, Kentucky, was 6:35 A. M. November 9, 1917.

Q. Now what, if anything, did you do about notifying the parties indicated upon the way-bill who was to be notified as to the arrival of that car?

A. Well, the first effort I made was to communicate with the firm of Marshall & Kelsey by telephone.

Q. Where?

A. At the hotel Henry Watterson.

Q. How did you know anyone was there?

A. Well, previous to the arrival of the car, say a week or ten days before, one of the firm of Marshall & Kelsey called me by tele-

phone, left the address of the hotel, told me to reach him by telephone when the car had arrived.

Q. Did you reach or try to reach Mr. Kelsey at the hotel Watterson after the arrival of the car, and if so, when?

A. At 2:50 P. M. November 9th.

Q. You are refreshing your recollection from what—from the record made at that time?

A. From the record made at the time, the train was handled and backed.

Q. What notification, if any, did you give to Mr. Kelsey on that day?

A. We also forwarded him a postal notice.

Q. Did you get him by telephone?

A. No, sir; left word with the clerk in charge to leave word with Mr. Kelsey of Marshall & Kelsey to call the Big Four Railroad that we had a car of freight for him.

Q. What other notice did you give him?

A. Postal notice.

Q. What have you to refresh your recollection as to whether that was mailed and went to him?

A. Have a carbon copy of the original.

Q. That was made out when, and addressed to him where?

A. That was made out at Louisville, 11-10, addressed to Marshall & Kelsey for Mr. Kelsey, care of Henry Watterson Hotel, City; made out in Louisville on the 10th.

Q. Mr. Kelsey had previously notified you to let him know at this address?

A. Exactly.

Q. On the arrival of cars of this kind?

A. Yes, sir.

Q. Now, what next did you learn about this car?

A. Well, we tried to find out something about it.

Q. Not we, tell yourself, I.

89 A. I tried to find out, locate Marshall & Kelsey, in order for them to take care of the car. We——

Q. Just tell what you did say.

A. I turned it over to one of our correspondent clerks to take it up.

Q. Never mind that. What is the next you heard about the car yourself?

A. A Mr. Bindner of the Southern called me up.

Q. Called you up, when?

A. Well, about the 14th or 15th, somewhere along there.

Q. Can you refresh your recollection by referring to any of your papers as to when that was, or about when?

Mr. Hall: I object to that as incompetent, irrelevant and immaterial, and ask to have any former questions and answers on that subject stricken out, same objection that was made to the testimony of Mr. Bindner.

The Court: Well, I will take it.

A. Yes, sir.

Mr. Hall: Talking now about Kelsey or talking about whom?

A. Bindner, cashier of the Southern.

Q. Binder called you up about when?

A. The morning of the 14th.

Q. How do you fix that date?

A. Well, we released the car—we released the car at 3:00 P. M. on the 14th. There was a car service charge accrued on the car, and when Mr. Bindner told me that he had the bill of lading—

Mr. Hall: Just a minute, I object.

Q. What did he say? Give the exact words. What did Mr. Bindner say to you over the telephone?

Mr. Hall: What Mr. Bindner said I object to it, and move that the answer be stricken out.

The Court: Well, I will take the answer.

A. Mr. Bindner says, "I have the bill of lading on that car, and why don't you send it out?"

Q. And what?

A. And "why don't you send it out?"

Q. He asked you to send it out?

A. Asked me to send it out.

Q. What did you tell him?

A. I told him I would providing he would—or the Southern Railway would—guarantee me our car service, and that he had the bill of lading.

Mr. Hall: This is all under our objection.

The Court: Yes, may be so understood.

Q. He told you he had the bill of lading?

A. He had the bill of lading.

Q. And did he say anything to you prior to the time you sent the car out, about any arrangement he had with Mr. Kelsey, about these bills of lading?

A. None whatever, none whatever.

Q. Now, you sent the car out from Louisville the 6th of November to Dumesnil?

A. Yes, sir.

Q. Did you make out new billing, or do you make out a new bill so that the car could come on?

A. I had the heading changed from Louisville to Dumesnil.

Q. That is, instead of making out a new way-bill, you merely changed that and forwarded the car to Dumesnil?

A. To Dumesnil, exactly.



## CROSS-EXAMINATION.

By Mr. Hall:

Q. Will you please read into the record as far as N. Y. C. car 151473 the entire information on this sheet, giving the proper heading at the top of each item?

A. Initial—you wanted the headings?

Q. Yes.

A. Car arrived in Louisville 6:35 A. M., November 9, 1917. Train 95. Initial N. Y. C. 151473. Potatoes.

Q. Contents that would be, wouldn't it?

A. Contents. Point of billing, Benton Harbor. Destination, Louisville, Kentucky. Date of Way-bill 11-3. Number 8. Consignee, Camp Quartermaster, Camp Taylor.

Q. That is the commissary instead of Camp Quartermaster?

A. Commissary Department, Camp Taylor.

91 Q. And who does this record come to in the first instance?

A. Me.

Q. And directly from whom?

A. The yard clerk.

Q. You want to keep that there, don't you?

A. Yes, sir.

Q. Now, what is this book you have?

A. This is the book where I have entered all carload freights, dead freight that arrive. This is the number, initial, and it is more for a telephone record.

Q. Tell me first—give me the railroad name for the record. What do you call it?

A. Well, that is the telephone book.

Q. Now, just read the records, the whole business, giving the headings and everything, if they are applicable—are they—hardly, are they?

A. No.

Q. Just give me what you have got there on the car in question.

A. N. Y. C. 151473, potatoes, Bailey, order, notify Marshall-Kelsey, telephone number, Main 3461. Time 2:30 or 2:50 P. M.

Q. Is that in your own handwriting?

A. Yes, sir.

Q. It is a record that you, personally, made?

A. Personally made.

Q. Now, this is a carbon copy of your postal card notice?

A. Yes, sir; that is made out by car service.

Q. Not by you personally?

A. Not by me personally.

Q. But under your records or under your supervision?

A. Supervision.

Q. One of your clerks?

A. Yes, sir.

Mr. Hall: I offer it in evidence.

Mr. Waer: No objection.

Mr. Hall: Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Louisville, Kentucky, station, 11-10-17. Following property is now ready for delivery to you upon payment of charges: Car initials X, Y, C. 151473; contents, potatoes; point of shipment,

Benton Harbor, Michigan. Charges \$110.25. Under that \$2 83.31, \$113.53. Loading in—(Car number blank.)

From—(Car number blank). Make checks payable—Agent. This company will not be responsible as a common carrier or a warehouseman after expiration of free time covered by tariff. The goods may be delivered by the public warehouse at your expense. Carload freight will be subject to car demurrage charges if not removed within free time, under car demurrage rules. Deliver above specified property to bearer. Signed here—consignee. On the reverse side, Marshall & Kelsey for Mr. Kelsey, care Henry Watterson Hotel, City. And printed on it return to Agent C. C. C. & St. L. Railway Company, if not delivered in five days.

Q. This is a carbon copy of your notice?

A. Yes, sir.

Q. Stamped across with a rubber stamp are the words, "Present bill of lading". Now, did you cause that to be put on there?

A. That is put on there by the car service clerk on every order-notify shipment.

Q. That stamp was also upon the original card sent to Mr. Kelsey?

A. Yes, sir.

Q. In other words, you knew it was your duty to require the surrender of that bill of lading before you delivered the car to Mr. Kelsey; isn't that true?

Mr. Waer: If the court please, we object to that question as not bearing upon the issues in the case. It is a question what was done, not what might have been done.

The Court: I think so. That is a question that I will have to struggle with.

Mr. Hall: Well, your Honor, I don't believe so in this instance. I will ask another question.

Q. I will ask you if the rules of your employer to you and the instructions of your employer to you were not—if they were not to put this stamp upon every notice that went out and also upon your carbon record of it on all shipments moving on order bill of lading?

Mr. Waer: The same objection.

The Court: Take the answer.

A. That is the order that I am almost positive that the car service clerk has.

Q. Yes. Well now, I will ask you if it is not also true that your rules provide that you shall not—strike that out. I will ask you if your rules provide that upon an order shipment moving on order

bill of lading, bearing the notice, "allow inspection," if the inspection is allowed without the production of the bill of lading?

A. It is allowed without the surrender of the bill of lading.

Q. But without the production?

A. Well, when the billing, inbound billing, carries the notation, it is allowed with the production.

Q. Yes, for instance, have you seen this original bill, Mr. Smith? (Showing witness paper.) Production of the bill of lading would not have been required to inspect these goods under that billing, would it?

A. No, he would not have needed any bill of lading to inspect the goods under that billing.

The Court: You refer to what billing?

A. The billing that the car traveled under.

Q. Well, it is the Big Four billing covering the movement of the car from Benton Harbor to Louisville, and later changed to Dumesnil, which has been read into the record.

Mr. Waer: I might say, your Honor, that both the bill of lading and the way-bill of this car bear the notation, "allow inspection."

Mr. Hall: Yes, there is no question about that.

Q. Now, Mr. Smith, I will ask you if it was not the rule of your employer that you should not deliver the shipment described in the way-bill to which we have just referred, without the surrender of the bill of lading?

A. Yes, sir.

94 Mr. Hall: I ask to have this way-bill just referred to marked as an exhibit for the purpose of referring to it and identifying it. (Way-bill marked Exhibit "F".)

Mr. Hall: We can call this Exhibit F.

Q. And you knew that under the strict interpretation of your rules given you by your employer, you had no right to let this car go to Dumesnil without the production of the original—without the surrender of the original order bill, did you not?

Mr. Waer: Same objection.

The Court: Take the answer.

Mr. Waer: You can answer.

A. I sent that car.

Q. No, now just read him the question.

Mr. Waer: He is requiring you to answer his question yes or no if you can. He is cross-examining you.

(Question read.)

A. No, sir.

Q. Well, what did you know about it, Mr. Smith?

A. No, sir; I had no right.

Q. To do that?

A. To do that.

Q. And when you understood from Mr. Bindner that he had the bill of lading, you took a chance?

A. I took a chance on his word that he had the bill of lading and on Mr. Kelsey's word that he surrendered the bill of lading to Mr. Bindner, for the simple reason that he paid the demurrage charge for the release of the car to let me send the car to Dumesnil.

Q. Well, did you send the car to Dumesnil without the payment of demurrage?

A. Yes, sir.

Q. You demanded that payment before you let the car go?

A. I demanded the payment or guarantee or the payment by the Southern Railway before the car would move.

Q. Well, did Kelsey actually pay you the demurrage?

A. Kelsey called in person to see me the following morning after Mr. Bindner told me he would guarantee the car service; Mr. Kelsey appeared in person and paid the demurrage and at the time remarked that he felt like it was an injustice in him paying the demurrage, that the car should have gone on to Dumesnil, and at the time I told him that if he could show where the agent at that point of origin fell down in misbilling the car, we would gladly refund him the car service.

Q. Well now, did you ever receive this original order bill?

A. No, sir.

Q. In the hands of the Southern?

A. No, sir.

Q. Did you ever demand it from them?

A. No, sir; when Mr. Bindner told me he had it, I ordered the heading of the billing changed, and all the charges to follow outside of demurrage to the Southern Railway. I sent the car to the agent or his cashier, his attendant, at Dumesnil.

Q. Well, you sent that upon Mr. Bindner's statement and also upon the assurance of Mr. Kelsey that he had already made delivery of the bill of lading to Mr. Bindner?

A. That Bindner was holding the bill of lading.

Q. Just what were Kelsey's words in that regard to you, Mr. Smith?

A. Well, my best recollection is that Mr. Kelsey came in the office—it was understood we were holding the car there for some demurrage charges. I told him this, told him the amount. Then he complained about having to pay that, said the car ought to have been at Dumesnil. I told him the billing read "Louisville". I asked him if he had the bill of lading. He said the bill of lading was surrendered to the Southern Railway office at Dumesnil, they had the bill of lading. I told him at the time if he could prove that the car was way-billed wrong to Louisville instead of Dumesnil, that we would refund him his car service.

Q. Did you yourself, change this billing on Exhibit "F" from Louisville to Dumesnil?

A. No, sir; I had the bill changed by a clerk in the office.

96 Q. And that was done after this talk with Mr. Bindner?

A. After Mr. Kelsey came in.

Q. After Mr. Kelsey told you that Bindner had the billing?

A. After Kelsey paid the car service.

Q. And before you knew that Bindner had the billing or the bill of lading?

A. No, after.

Q. After the car service was paid and after Bindner——

A. Bindner told me he had the bill of lading, the heading of the way-bill was changed.

Mr. Hall: I see. That is all.

Re-Direct Examination.

By Mr. Waer:

Q. You made no mistakes. Bindner had talked with you and told you that he had the bill of lading, and Kelsey had also talked with you and told you that Bindner had the bill of lading before you sent the car from Louisville to Dumesnil?

A. Yes, sir.

Mr. Waer: That is all.

Re-Cross Examination.

By Mr. Hall:

Q. Had you at any time told Kelsey that he would have to surrender the bill of lading at Louisville?

A. No, sir.

Q. And you don't claim, do you, Mr. Smith, that you had any instructions from the shipper to change the destination or change the billing or anything of that sort?

Mr. Waer: By the shipper you mean Jay J. French & Company?

A. No, sir; I figured that the car belonged to Kelsey.

Mr. Waer: Just answer his question.

Mr. Hall: He has all right.

A. No, I didn't have any.

Q. You didn't have any?

A. Not from the shipper.

Q. Whether wisely or unwisely, you acted upon Bindner's and Kelsey's say so, is that a fact?

A. I acted upon the holder of the bill of lading say so.

Q. That is, he told you?

A. Well, you have it.

97 Q. Yes, you have never seen it.

A. I never saw it.

Q. You never saw it in his possession?

A. From the evidence it is proved that it was already in his office at the time the car was there.

Q. I am talking about you personally?

A. Personally I never saw the bill of lading.

Q. You don't know when he got it, don't know when he gave it back?

A. I don't know when he got it or when he gave it back. All I know, he had it, told me he had it when I released the car.

Mr. Hall: That is all.

Mr. Waer: That is all. That is all our proof except the documentary evidence.

Mr. Waer: If the Court please, I offer in evidence as a declaration against interest, the statement made by counsel to your Honor yesterday, in the absence of the jury, the stenographer's transcript.

Mr. Hall: I object to it being received as a statement against interest. It was thoroughly understood that it was made for the purpose of informing the court what all the facts were in the transaction and merely for the purpose of clarifying the issue and giving the court information which might be used or not, as he saw fit when the questions came up, and not to be used as evidence or anything of that sort.

The Court: I don't believe it can be used as evidence. It was given under the circumstances given by counsel and I do not believe that advantage ought to be taken of it, nor do I think it can be taken of it.

Mr. Waer: I ask to have it marked for identification as defendant's exhibit.

(Paper marked Exhibit "D-2".) The statement is one found at the beginning of this Bill of Exceptions.

Mr. Waer: I take an exception to the statement of the court declaring that it is incompetent, and ask that the stenographer attach it to the record as being a statement of the counsel to the court. I also offer in evidence a letter of Hall, Gillard & Temple as to the claim covering this car and ask to have it marked for identification "Defendant's Exhibit 3."

(Letter marked D-3 for identification.)

The letter is as follows:

EXHIBIT "D-3."

Hall, Gillard & Temple,

Lawyers,

328 National City Bank Bldg., Campau Square,

Grand Rapids, Michigan.

January 2nd, 1918.

E. D. Hawley, F. C. A.

Pere Marquette Railway Co.,

Detroit, Michigan.

DEAR SIR:

Confirming conversation between you and Mr. Parker and our Mr. Hall on Friday last, we herewith enclose you papers on N. Y. C. car No. 151473.

About October 22nd last, F. E. Kelsey, of Marshall & Kelsey, 422 N. Meridian St., Indianapolis, Indiana, made a contract with H. Elmer Moseley, a produce broker of this city, for the purchase by Marshall & Kelsey and the sale by Mr. Moseley of forty cars of potatoes, loaded to capacity, preferably with a thousand bushels to the car, shipped on order bills of lading to the order of the shipper at Louisville, Ky., notify Marshall & Kelsey, at Louisville, Ky., c/o Quartermaster at Camp Zachary Taylor; invoices to be mailed to F. E. Kelsey, c/o Hotel Watterson, Louisville, Ky. The price was \$2.63 a cwt., less the freight rate from Michigan common points to Indianapolis. Marshall & Kelsey requested that the drafts for the purchase price be attached to the original order bills of lading and sent to the Commercial National Bank of Indianapolis for collection. All cars were billed "allow inspection."

Mr. Moseley divided this order up by giving twenty cars of it to Reed & Cheney Company of this city; 10 cars of it to J. F. French & Company of this city; and 10 cars to J. B. Conger, New Era, Michigan. There are six of Reed & Cheney Company's cars; three of French & Company's cars and three of J. B. Conger's cars in the same situation as the French car covered by these papers, with the exception that the Conger cars were billed directly to the order of Mr. Conger at Dumesnil, Ky., notify Marshall & Kelsey.

We enclose herewith memoranda of bill of lading on N. Y. C. car No. 151473 shipped from Bailey, Michigan, on November 3d, 1917, by J. F. French & Co., copy of invoice from J. F. French & Co., to Marshall & Kelsey; copy of memoranda bill of lading, issued on December 7th, 1917, at Grand Rapids on reconsignment of this car to Memphis, Tenn., and copy of wire under date of December 19th from McKnight & Hill at Memphis, Tenn., showing the condition of the potatoes. The car was released to McKnight in accordance with their request, and altho we wired them Sunday last to give us the proximate out-turn of the car we have not yet been able to obtain same.

It appears that upon the arrival of this car at Louisville the heading on the billing was changed by the terminal carrier into Louisville, making it read from Louisville, Ky., to Camp Taylor, or Dumesnil, Ky., and the car was immediately forwarded by the Southern line to Dumesnil, or Camp Taylor without requiring inspection of the car or acceptance or rejection, and if accepted the production of the original order bill of lading at Louisville.

100 These cars were billed to Louisville purposely for the reason that the only thing at Dumesnil was the government camp and that point takes a 6c. local rate over the thru rate from Michigan common points to Louisville. Marshall & Kelsey had no financial rating and while the shippers did not anticipate any trouble in the matter they did not know if, for any reason, the car was rejected they wanted it done at Louisville so that they would have a better opportunity to dispose of the same in a comparatively large town or to have it at a point where it could be easily diverted to other good markets. They were entirely deprived of this right by the wrongful action of the carrier in changing the billing from Louisville to Dumesnil or Camp Taylor without any authority from or notice to the shippers. This car and all of the other cars arrived at Dumesnil somewhere between the 11th and the 17th of November, according to our best information.

French & Company attached draft for the purchase price of this car to their original order bill of lading and deposited it in the Grand Rapids Savings Bank of this city, with which he does all of his business, and that bank gave French & Company full credit for the amount of the draft. At the request of Mr. French the Grand Rapids Savings Bank forwarded the draft and bill of lading to the Commercial National Bank at Indianapolis this being in accordance with the request of Marshall & Kelsey to Mr. French.

It appears that as soon as the drafts and bills of lading reached the Commercial National Bank the order bills were detached from the drafts and delivered to Mr. Kelsey of Marshall & Kelsey without requiring the payment of the draft or any indemnity or security in any form. Mr. Kelsey took the bills of lading and delivered them to the agent of the Southern Railway at Dumesnil who held  
101 them at least from the time the cars arrived at Dumesnil, if not before.

On November 29th or 30th, the Quartermaster at Camp Taylor advised Mr. Kelsey that he had shipped more potatoes than the Quartermaster had ordered and would not take any more potatoes than could be unloaded by November 29th or 30th because he had purchased from Mr. Kelsey only for the November supply and he had made another contract with another party for the December supply.

On November 30th Mr. French and the other shippers learned of this action taken by the quartermaster and they also learned that the original bills of lading for all these cars were held by the agent of the Southern Line at Dumesnil. They presented these facts to their bank which immediately wired the Commercial National Bank at



Indianapolis demanding payment of the drafts on the cars, twelve in number, then standing on track at Dumesnil.

At this time the shippers also learned that the agent at Dumesnil held the bills of lading covering these twelve cars which were then on track, the bills having been delivered to him by Mr. Kelsey. In a conversation with the writer of this letter the agent at Dumesnil said that these bills were delivered to him originally in the ordinary course of business for the purpose of obtaining delivery of the cars just as any such transaction was handled and were not delivered to him for any special purpose.

On the morning of December 3d, the writer of this letter arrived at Indianapolis and had a conference with the bank and learned from the President of the bank the facts stated herein concerning the detachment of the original bills of lading from the drafts, and the delivery thereof by the bank to Mr. Kelsey without payment of a cent, or any indemnity or security of any kind.

102 The next day the writer learned that about the time he arrived at Indianapolis the agent at Dumesnil re-delivered the original bills of lading back to Mr. Kelsey, and according to the statement of the agent the representations made by Mr. Kelsey to the agent, and which induced the agent to redeliver the bills to him, were far from being correct. At any rate Mr. Kelsey got the bills of lading back from the agent and he took them back to the Indianapolis bank, which reattached them to the drafts and tendered them to the writer. It was necessary to make a further investigation and to see what steps we could take in order to get relief from the situation which then was as follows: The market price of potatoes had declined about \$1.00 a hundred from the contract price and somewhere near \$1,000 demurrage had accrued upon the twelve cars. We were unable to get any action from the Southern Railway, or any of the other railroads and Marshall & Kelsey refused to do anything with the potatoes, or anything of that sort. Deeming it our duty to do what we could to make the loss as light as possible we obtained the drafts and bills of lading on these twelve cars from the Commercial National Bank under protest, and gave the bank, Marshall & Kelsey and the railroads notice that they had been accepted under protest and that the cars would be handled under protest for the benefit of all concerned and for the sole purpose of making the loss as light as possible.

On the morning of December 7th delivery of the original order bill of lading was made to the initial carriers for the purpose of re-consigning and reconsigning billing was issued. The car in question arrived at Memphis about the time stated in the telegram from McKnight & Hill. Since we commenced writing this letter we have received a telegram from McKnight and Hill showing the net proceeds of this car to be \$411.00. We enclose copy of the telegram herewith.

103 We think these are the material facts which you will need. We reserve the right to make any changes in or additions thereto if

further investigation shows a necessity therefor. We are simply giving you our best information at the present time.

Yours very truly,

HALL, GILLARD & TEMPLE.

H-S.

Enc. 1.

Pere Marquette Railway Company.

DETROIT, MICH., Jan. 12, 1918.

Mr. Clare Hall,  
c/o Hall, Gillard & Temple, Attorneys at law,  
Grand Rapids, Michigan.

MY DEAR HALL:

Our Freight Claims Agent Mr. Hawley received your letter relative to the potato shipments about which we had a conference when you were in Detroit recently.

He arranged to send an investigator to Louisville and had the man call upon me to talk the situation over before going South. At the conference it was suggested by our investigator that it would be very desirable if possible, to have the documents and facts regarding all of the cars involved in your claim, so that he could check up each one when in Louisville. This plan has two advantages: First, the actual facts regarding each car can be secured on one trip, thus reducing the expense of the investigation to a minimum; Second, if we attempt to go over the ground again regarding the other cars we may have more difficulty in securing the facts regarding them. Our investigator says that he has had cases where that was the fact.

I am writing this phase of the matter because Mr. Hawley suggested when you were in Detroit that he would start the investigation as soon as he had the documents on one car, and I am loath to make any change in the arrangement without your fully understanding and approving of the course.

We are anxious to make the investigation promptly and at the same time thoroughly and at a minimum expense. Do you not think the plan above suggested would be the best one to pursue and would it not be possible for you to get all of the information on the other cars to us in another week?

It is my understanding that if we aid you in establishing that liability is clearly with the other carriers, and that our liability, if any, is solely that of initial carrier under the statute, you will not involve the Pere Marquette in the litigation.

Will you kindly let me hear from you at your earliest convenience, and oblige,

Yours truly,

THOS. S. PARKER,  
General Attorney

T. S. P.

January 21st, 1918.

Thomas S. Parker, Att'y.  
1526 Penobscot Bldg.,  
Detroit, Michigan.

DEAR PARKER:

Your favor of the 12th inst., received and contents noted. Answer has been delayed because of the absence of our Mr. Hall from the city.

We appreciate very much your attitude in this matter and we know that an investigation conducted by you would be of great assistance to us. At the present time we are unable to give  
105 you any more information than we have already furnished.

The reason is that we have not received returns on the other car. We are at a loss to understand why this is so, but nevertheless it is a fact.

We have thought the matter over very carefully, and while all of our clients and ourselves appreciate the attitude that everyone connected with our company who has known about the matter expressed, we feel that we are obliged to commence a suit against your line on the cars handled by you sometime during the present week in order to get the case on for trial at the March term of our court.

We would be perfectly willing to give you our reasons in a personal interview, but we do not feel it advisable to put them on paper.

We will wait until we have had an opportunity to receive a reply from you before starting our suit, but our present opinion is that we will be compelled to sue you before the week is over. We will be glad to hear from you.

Assuring you of our sincere appreciation of the offers of assistance which you and Mr. Hawley have extended and trusting that you will look at the matter from our viewpoint, and not feel too provoked at us because we cannot see our way clear to let you out, we are,

Yours very truly,

HALL &amp; GILLARD.

H-S.

Pere Marquette Railway Company.

Detroit, Michigan, Jan. 23, 1918.

Mr. Clare J. Hall,  
c/o Hall, Gillard & Temple,  
National City Bank Bldg.,  
Grand Rapids, Michigan.

106 DEAR HALL:

I have your favor of January 21st, and note the contents of the same.

I see that the alleged necessity of suit against the Pere Marquette

's still buzzing in your bonnet. Of course I cannot prevent you from doing this if you have determined upon such action. I suppose all I can say is—"Look out that the bee doesn't sting you."

I am of the opinion that you would not only be losing no rights in eliminating the Pere Marquette from your proposed suit, but that you will be unable to establish liability against it in any event. I believe, however, that I expressed this view to you personally. Apparently I have not succeeded in convincing you. If so there is nothing left to do but to try the case out.

If you should change your mind and conclude to proceed along the lines suggested by me I would be very glad to hear further from you. As you know my attitude is to give you what assistance I can, provided the Pere Marquette is not dragged into a lawsuit over a transaction concerning which it is blameless.

However, I always enjoy meeting you whether it be in the smoky atmosphere of a court room battle, or under more friendly circumstances, and trust that I shall have the pleasure of seeing you again soon. Let me know in any event what you decide to do.

With kindest regards to you personally, I am

Yours truly,

THOS. S. PARKE,  
*General Attorney.*

T. S. P.

Mr. Hall: Which letter is that, Mr. Waer? What is the date?

Mr. Waer: Dated January 2nd, 1918.

107 Mr. Hall: Let me see. I object to it as incompetent.

Mr. Hall: Let me see. I object to it as incompetent, irrelevant and immaterial. Mr. Parker, whom I saw at Detroit, before we knew what the out-turn of this particular car would be—I told Mr. Parker about it, just as a matter of general interest, and he wanted to know what I was going to do, and I told him that I expected—I had the papers to file—to sue the Pere Marquette Railway Company as initial carrier. He said, "I will tell you what I will do. You send me a statement of what you claim the facts are in this case, and I will investigate it and give you the benefit of our investigation if you will agree not to sue the Pere Marquette Railway."

Mr. Waer: If the court please, I object to any further statement of this kind. The letter speaks for itself.

Mr. Hall: Well, that letter is a compromise letter, and you know it is incompetent Waer, and you have no business to offer it.

Mr. Waer: I offer it and I ask the court to pass upon it.

Mr. Hall: I will go on the stand and testify to these facts, but it is incompetent, irrelevant and immaterial, and made for the purpose of letting the Pere Marquette Railway Company out of this matter, and it was not acted on.

Mr. Waer: It accompanies the claim papers in the case.

Mr. Hall: It does not accompany the claim papers in this suit. The letter with the claim papers was sent to E. Hawley.

Mr. Waer: That is the letter and it recites the claim in the case.

Mr. Hall: That is not the letter reciting the claim in the  
108 case.

Mr. Waer: Well, it does.

Mr. Hall: No, it does not, Mr. Waer.

The Court: Just a moment, gentlemen.

Mr. Waer: I would like to have the record show that I offer that as a declaration against interest also.

Mr. Hall: Before your Honor rules, I would like to have you look at this other correspondence (showing papers to the court.)

The Court: I think that all the correspondence between the attorneys should be offered; as each letter is associated with every other letter sent and more or less explanatory. If you want to offer the several letters that have been submitted to the court, they may be received.

Mr. Waer: I would like to see them, if the court please.

Mr. Hall: Well, your Honor, I would like to say before the court makes a ruling, that I want to be sworn. Now this whole matter, as I have stated, was an agreement to not sue the Pere Marquette Railway Company.

The Court: Well, the letters explain themselves. I think they are self-explanatory on that point.

Mr. Hall: Well, if the attorneys cannot have an agreement to compromise an affair and write letters that are going to be sacred and not be used in a deal of this kind—now, that letter was written a couple of months or a month after this thing happened. I state on the bottom of it that that is my understanding of the facts, now it is not necessarily true, that I reserve the right to change or add to or anything like that if any other development comes up, and it is absolutely incompetent to offer that kind of correspondence and it is not right for counsel to even propose it. Parker, Shields & Brown are counsel in this case, and Tom Parker is the head of the firm and he is the fellow that that letter was addressed to  
109 and with whom my agreement was made.

Mr. Waer: It was not addressed to him at all, Mr. Hall.

Mr. Hall: Well, he acknowledges that it was under that agreement to him, and I submit that that correspondence should not be admitted in evidence, before the court rules on it.

The Court: Just a moment. Is it expected that from this correspondence some question of fact will be raised whereby the case will be taken to the jury?

Mr. Waer: It is not, your Honor, except in this way. Our claim of course, is that the court should instruct the jury in a certain way; but if the court should disagree with us on that proposition and should submit to this jury certain questions of fact, we surely are entitled to have the jury know all the circumstances of the case, and we ask that the jury, if they are going to pass upon the questions of fact in this case, be given the same facts and the same light that the court has. We are not trying this case before the court without the jury or before the jury without the court. We are trying it as one case. If the questions of fact develop in this case which the court thinks warrant the submission of the case to the jury, then we submit

that the jury be given all the evidence in the case whether developed by the evidence or by the admission of counsel.

Mr. Hall: Now, your Honor, this last paragraph of my letter: We think these are the facts. We reserve the right to make any suggestions or changes; we are simply giving you our best information at the present time. Now we have got the testimony, everybody that has known anything about this case has been here and given their testimony with their records.

Mr. Waer: How about the banker and Mr. Kelsey?

115 Mr. Hall: It is absolutely immaterial about the bank and Mr. Kelsey. And to have that incompetent evidence, it is not an admission against interest. It was a matter of compromise. That is clearly shown by the letter. It is a violation of confidence by counsel.

Mr. Waer: I may say to the court that that letter will not be offered if the statement of counsel is admitted.

The Court: I don't think it is competent. I think the testimony here ought to be adduced before the jury and not be brought in in this letter. If the defendant has any evidence to offer as to the conduct of Mr. Kelsey or the bank which is pertinent to this case, it ought to be produced. Whatever statements counsel may have made in their letters or their correspondence may or may not represent the actual facts in the case. His statement to the court in the absence of the jury was made tentatively and not in accordance with the usual practice of the court, but it was listened to. I think this case must be decided upon the testimony that is produced here, by documents and by oral testimony competent and material to the issue. I will sustain the objection. I will not receive these letters.

Mr. Waer: We ask to have the record show that the letter was offered as an admission against interest, and have the stenographer's minutes mark it.

The Court: Why, the record will show whatever is said. The record will show whatever is said and there is no necessity of repeating it.

Deposition of Captain F. K. HENSON, Q. M., U. S. R., taken on behalf of the defendant at Camp Zachary Taylor, Kentucky, was read in evidence as follows:

I am captain in the Quartermaster's Department, in charge of the subsistence branch at Camp Zachary Taylor. In general my duties are to requisition, purchase and inspect supplies, and included 111 in such duties is the purchase and inspection of potatoes obtained for the camp. I have had more or less experience in the purchase and inspection of potatoes for the Quartermaster's Department for the last three or four years. I was in the same official position in November that I now occupy. I have in mind that during the month of November the Quartermaster's Department obtained from Kelsey & Marshall a supply of potatoes, and during that month certain cars were received from that firm and accepted by the government. During the month of November certain cars were sent in by these people which were accepted.

Q. Do your records there show approximately how many?

Mr. Hall: Just a minute. I object to that, your Honor. Has your the original deposition?

Mr. Warr: No, I have not.

Mr. Hall: Where are they?

The Court: In the clerk's office. There are the files. They keep the depositions separate.

Mr. Hall: Better get the depositions. That is the answer to the question that the witness has just read and I object to it as incompetent, irrelevant and immaterial. It is a general answer, and the matter—inquiry should apply only to the car in question, and the condition it relates in that answer is incompetent, irrelevant and immaterial as to this particular car because it does not make any difference what happened to this car after it left Louisville; the conversion was consummated there and the carrier became immediately liable to the shipper on the 18th day of November when they delivered the car to the Southern Railway—no, on the 14th day of November, or whatever day the evidence shows the carrier became immediately liable as of that day, and any testimony concerning this particular car is incompetent, irrelevant and immaterial after that, and the objection is especially good, because it seems to  
112 apply—the testimony seems to apply to several cars and not to the car in question.

Mr. Warr: In addition to that I would like to state for the benefit of the record, that I agree thoroughly with counsel's statement that all the evidence he has introduced pertaining to any damages caused to the car after it left Louisville is incompetent against the defendant carrier, which is the initial carrier, and I offer this because counsel's testimony of damages occurring after that time was admitted, and I must therefore have an opportunity to meet it.

The Court: Well, I am not sufficiently advised on this question of the measure of damages by either counsel.

Mr. Hall: Well, there is our exhibit "B."

The Court: To rule intelligently on this question unless I proceed to look it up. I supposed that that was the purpose of counsel in the case to advise the court.

Mr. Hall: Well, I am ready to advise the court on my side of the case. This is our contract and the second paragraph of Exhibit "B," reads as follows:

"The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid, at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs."

Mr. Hall: There we have it. A bona fide invoice which is undisputed. Now we salvaged the car. We got \$411.00 and something. We are entitled to the difference between the bona fide in-

invoice price and that salvage. If we had not salvaged the car we would be entitled to the invoice price.

111 The Court: Well, now, just a moment. When this question came up my attention was not directed to this clause in the bill of lading fixing the amount of the liability and I made that ruling without appreciating the fact that there was such a provision in the contract between the parties. I think perhaps the testimony that was offered as to the condition of the potatoes, if any, was received, was not properly received in evidence. I cannot see where any harm is done by receiving evidence of the fact that the consignor took possession of the car and disposed of the potatoes and received the best price possible for them in order to minimize the damages against the defendant railroad company. That is one proposition, but the other proposition as to the situation of the car after the conversion and the condition of the contents of the car is another question. It does seem to me that that provision is controlling in this case on the subject of the measure of damages, the bona fide invoice price of the measure of damages, the bona fide invoice price at the place of shipment. That seems to me controlling and the only question in this case is as to whether or not there was a conversion under the facts, and if there was a conversion then the latter conduct by either the defendant company or its connecting carrier or anyone else in relation to the car would become irrelevant and immaterial except as it might bear upon the disposition of the car and the application of the proceeds to minimizing damages. If the plaintiff had left the car entirely alone and the jury should find, if it becomes a question for the jury, that there had been a conversion, then the measure of damages would have been fixed and determined by the invoice price in this case, as I understand it. Is that as you understand it?

Mr. Hall: That is as I understand it.

112 The Court: Do you have any different understanding?

Mr. Waer: Yes, your Honor.

The Court: What is it?

Mr. Waer: It seems to us that the claim of the plaintiff must be first, that there was a wrongful delivery of the car at Louisville, our claim being that we delivered the car rightfully to the party in possession of the bill of lading, and if the court should rule against us on that proposition and should hold as a matter of law that there was a wrongful delivery of the car at Louisville, then the further question presents itself as to whether or not the damages suffered by the plaintiff were the result of the wrongful delivery, which might raise questions of fact for the jury.

The Court: What are you to do with this provision of the contract? What effect has that upon the proposition, if there was a wrongful delivery? Doesn't that fix definitely and for all time the measure of damages in case of a wrongful delivery, a conversion?

Mr. Waer: I would not say so, your Honor. I would say it fixed the damages, provided the damages were the result of a wrongful delivery. It is up to the plaintiff to prove that the damages he suffered was the result of the delivery which the court finds was wrongful.



The Court: Well, now this thing analyzed simply means this, as I understand it. If it should be found that there was a wrongful delivery of this car at the point—at Louisville, under the contract between the parties, the shipper and the carrier, the measure of damages would be the bona fide invoice price at the point of shipment. The shipper would not be bound to follow the car after it had been diverted by such wrongful delivery; he would not be required to pursue it, overtake it, take possession of it, salvage it, get what

115 he could out of it, and give credit to the carrier for its amount so obtained. \* \* \* Now, in this case something more was done than to merely rely upon the terms and conditions of the agreement. The plaintiff under its claims on the discovery of the wrongful delivery as alleged retook possession of the car and shipped it to another place, viz., Memphis, Tennessee; sold the product and seeks to give the defendant credit for the proceeds of that sale. In other words, the plaintiff in this case has assumed an additional burden and responsibility, and what does that involve with reference to the testimony, in this case? \* \* \* Having taken possession of the car, the plaintiff would have to dispose of the product to the best advantage possible under all the circumstances in the interest of the defendant, so really the question to be determined here is as to whether or not the car after it was taken possession of, was disposed of, was disposed of to the best advantage possible under all the circumstances, to the end that as much might be realized out of the car as was reasonably possible. That burden has been assumed by the plaintiff voluntarily.

Mr. Hall: Well, now, the evidence is here, your Honor, that we delivered the bills of lading to the P. M. on the 7th and that our consigning was accomplished on the 8th, and the testimony of Mr. Baker was that the car left Dumesnil on the 9th. Now they were disposed of at Memphis, and the testimony is undisputed by the stipulation in the case that the car arrived at Memphis on the 18th. Now, I agree with your Honor, that if they can show that we did not do the best we could on the 18th or on the 9th and that sort of thing, we did not get all that we should get out of those potatoes, that is a proper subject of inquiry, but what happened? These depositions relate entirely to something that happened at Camp Taylor long before the 9th of December or the 8th of December, or

116 the 9th of December, and it has no bearing on this case and doesn't go to the subject, which your Honor has said will be a proper line of inquiry.

The Court: Well, I am going to sustain this objection, because this testimony, as I see it now, as I glance over it, and the question in controversy, together with the answer which I have before me do not particularly refer to this car in controversy, and it is but confusing the issue to leave to the jury transactions which may be upon an entirely different basis than the case we are trying. I will sustain the objection to this question.

Mr. Waer. Well, your Honor, it is impossible to read this or without some paragraphs referring to this and other cars. I might read—

The Court: I am sure I cannot try but the one case at a time. These other cars may be entirely different and there may be different questions involved in these other cars. This case involves the two questions I have already outlined, and how we can try this case by admitting testimony of the blanket variety I do not understand.

Q. There were some cars that were accepted, you know that?

Mr. Hall: I make the same objection.

The Court: Well, I think the objection is good.

Q. Will you briefly read the number of the cars like P. M. so and so of the cars rejected, the initial and number.

Mr. Hall: The same objection.

Mr. Waer: In the answer is included the car in suit.

Mr. Hall: Well now, that brings me to this question, testimony as to what happened at the camp with reference to this car of potatoes is absolutely incompetent, irrelevant and immaterial. We sold the potatoes to Marshall & Kebley and upon their instruction. We did not sell them for government inspection and we did not sell them to the government. Here is a government employee whose duty it was, according to his testimony here, to inspect these potatoes at the camp. Now, we did not have to sell him, and the facts that he rejected some of those potatoes or rejected the potatoes in this car is incompetent, irrelevant and immaterial.

The Court: I think so. It is the condition of the potatoes. If there is anything to show the condition of the potatoes as bearing upon the question of their value there, that may be material, but the fact that they were rejected at this camp is wholly immaterial because the standards of the camp may be one thing and the standards of the buyer may be another, and there may be various standards, and this case is not to be governed by the standards of any camp, but this case must be controlled by the market value of those potatoes, whether or not in disposing of them the plaintiff secured reasonably fair price. I think that is right; that must be the rule. I will make it so for the time being anyhow.

Mr. Waer: Does your Honor's ruling go to the extent of declaring that all the rest of the testimony is incompetent?

The Court: Well, I don't know what the rest of it is. If it is merely showing that this commissary down there rejected the potatoes, then I will exclude it.

Mr. Waer: There is additional testimony as to the condition of the potatoes, your Honor.

The Court: Well, I have already said that anything bearing upon the actual condition of the potatoes might be received as tending to show what their actual value was, market value.

Mr. Waer: In view of your Honor's ruling, I will read the questions as rapidly as possible in order to save time.

The Court: I will tell you what you may do. You may read the

whole deposition subject to plaintiff's counsel's objections.  
118 Go ahead and get it all in.

Mr. Hall: Plaintiff objects to any testimony as to the quality of these potatoes at Camp Zachary Taylor for the reason that nine of the cars were destined to Louisville under the bills of lading issued and the movement of the cars beyond that point was an acceptance of the potatoes, and any testimony as to their condition after they left Louisville is incompetent, irrelevant and immaterial. As to three of the cars which were shipped by J. B. Conger directly to Dumesnil, Kentucky, the plaintiff objects to any testimony as to the condition of those cars at Dumesnil, for the reason that the original bills of lading of those cars were surrendered immediately upon if not before the arrival of the cars at Dumesnil, without an inspection and, therefore, there was an acceptance of the potatoes in those cars, and the condition of the potatoes after that time is incompetent, irrelevant and immaterial.

Mr. Hall: All this testimony is under my objection.

The Court: All of it.

Witness (continuing): My records do not show how many cars were accepted; they only show the rejected ones. During the month of November certain cars sent in by these people were rejected. There were fourteen of these rejected cars, including the car involved in this suit. Eight other cars were sorted by the shippers and received by the camp quartermaster.

Q. Now, Captain, tell us how these cars were received by the government, how they were accepted and how they were rejected, that is as to the placing of the cars and their examination?

A. Well, the cars—all I know about it, the cars were placed at the warehouse by the railroad company, and when they were placed there we examined the potatoes, first examining them by taking  
119 several sacks from different parts of the car; that is, removing them from the car and emptying the sacks and examining them in that way, and if the potatoes were all right, we accepted them, and if not why they were rejected.

Q. Did you have anything at all to do with the bills of lading of these cars and did you see them?

A. No, sir; I did not.

Q. Now, will you tell us Captain, why either the twelve or fourteen cars, whichever number you first gave us as rejected cars, were rejected by you, if they were rejected?

A. On account of the rotten condition of the potatoes.

Q. And the rotten condition was due to what, in your judgment?

A. Well, in my judgment to field frost.

Witness (continuing): When I found that the potatoes were suffering from field frost and that I therefore could not accept them, I immediately notified the contractor, Marshall & Kelsey. I notified them promptly as to the rejection of these cars, and I did so practically as soon as they were placed and I had an opportunity for inspection. On behalf of the shippers, Mr. Whitkop and Mr. Conger and another gentleman, a Mr. Sandberg, came here to take action

with reference to these potatoes. They got here about the 19th of November and I talked with some of them about the condition of these potatoes. I talked with Mr. Conger and also with Mr. Whitkop, and they all seemed to be of the opinion that the rejection of the potatoes was justified.

Q. What did they say, if anything, about the condition of the potatoes—either of these gentlemen; either Mr. Whitkop or Mr. Sandberg or Mr. Conger?

A. I could not answer that question.

Q. Did you have any talk with them, if so, tell us as near as you can what it was? Just as briefly as you can.

A. Well, the condition of the potatoes was discussed on several occasions. Just what we said about them, I could not really  
120 say.

Q. Do you remember anything now that they said about the condition of the potatoes—that any of these gentlemen said?

A. Well, not any more than what I have already answered.

Witness (continuing): There was no difference in handling at the warehouse the cars that were rejected and those that were accepted. Along in November when Mr. Whitkop and Mr. Conger came down as representatives of the shippers, they took charge of the potatoes and went to sorting them. They sorted them at their own suggestion. All that they sorted were accepted by the government, the last of the sorting being done about the last of the month. They had what opportunity they needed, as far as I know, to sort these cars so that the government would accept them. They had the cars at their disposal, and I even went so far as to assist them in getting laborers to do the work, and gave them the use of my platform. I told them that I was willing to take all they sorted out up to the end of the month. We made no objection to these potatoes except that they were rotten through having suffered from field frost. We inspected none of the cars that we accepted from Marshall & Kelsey at any place except at Camp Taylor. We inspected none of the cars at Louisville, and would not under *any* circumstances have inspected them there.

Cross-examination.

By Mr. Hall:

Mr. Hall: It is understood that I do not waive my objection by reading the cross-examination.

The Court: Oh, it may be so understood, yes.

I arrived at Camp Taylor on the 27th of October from Fort Rettle, Wyoming. I had been in the quartermaster's department there since 1912. I had not had the same duties of purchasing and inspecting all the time. I was just connected with the general work in the Quartermaster's Department. I could not say how much  
121 actual experience I had had before I came here in inspecting potatoes in car load lots, after shipment. Inspected every

car of potatoes that came in this camp after the first of November. I had had a little previous experience with field frost in potatoes.

Q. Can you tell us the way in which a potato looks and is affected by field frost?

A. Well, that is a technical question; I don't think I will answer.

After I had rejected these cars eight cars were sorted and unloaded and were accepted by me. I have no means of telling how many of those eight cars exceeded the 3 per cent. allowed in the specification. I have the out-turn weights of the potatoes accepted out of these eight cars. When Mr. Whitkop came here I told him we didn't recognize the shippers in the matter. That the only persons we look to were Marshall & Kelsey. Mr. Kelsey was here on the 20th of November and had a talk with me and said these men say they will sort these cars and put the potatoes in good shape, and I told him that I could permit that, and the sorting began on the 20th or after that time. As soon as I talked with Mr. Kelsey about unloading Mr. Whitkop went right to work, and Whitkop was around there most of the time until the 28th, and had men working there all the time on these cars, and the same was true of Mr. Sandberg and Mr. Conger. Just as soon as they came they commenced sorting. On the 28th of November I told all of those three men I would not take any more potatoes than could be unloaded that day. I will not say that these men could have actually sorted more potatoes than they did. I don't know exactly what they were doing all the time. I had other duties to attend to and wasn't watching them. I saw them around daily.

The deposition of Colonel S. B. PEARSON, Q. M. C., U. S. A.  
122 taken at Camp Zachary Taylor, Kentucky, on behalf of the  
defendant was read in evidence as follows:

My full name is Lieutenant Colonel S. B. Pearson, U. S. Cavalry, Q. M. C., and I am the camp quartermaster and constructing quartermaster at Camp Zachary Taylor. My attention was brought to the large quantity of potatoes being rejected on the Marshall & Kelsey deliveries during the month of November, and I went over to the commissary and looked at the potatoes. They had been badly frost-bitten and were rotten and I directed Captain Henson to reject the cars from which the potatoes had been taken. I notified Captain Henson immediately to notify Kelsey & Marshall by wire of the rejection of these potatoes and I know from official records on file in my office that they were notified by telegram of three separate rejections under their contract.

"These three telegrams are all that I have record of showing notification of rejections and they referred to the following cars: N. Y. C. No. 215372; Erie No. 88561; L. & N. No. 4890; B. & M. No. 64114; M. P. No. 36926; N. C. & St. L. No. 4466; P. M. No. 31634. N. Y. C. No. 15365; P. M. No. 41300 and P. M. No. 40126.

Mr. Hall: Just a minute, your Honor, I renew my objection to strike out all the testimony from all these witnesses at Camp Taylor because it appears from the testimony of this witness that these are

all the telegrams he has a record of, and there is absolutely no testimony showing that this car was rejected and that anybody was notified of its rejection. At the top of page 23 it says: "Those are all the telegrams that I have a record of" and according to their own testimony it is all the cars that were rejected that anybody knows, and there is no testimony that there was any notice that this car was ever rejected by anybody.

The Court: What was the number of this car?

123 Mr. Hall: 151473, New York Central.

The Court: Well, I will let it stand. Go on."

"Mr. Hall: Your Honor, so I won't forget it, I want to get it on the record. This evidence shows that the contract between the government and Marshall & Kelsey called for the delivery of these potatoes at Camp Taylor, f. o. b. the cars at Camp Taylor. Our contract was with Marshall & Kelsey, and our contract was that we should deliver potatoes at Louisville, subject to inspection there, and acceptance or rejection there and therefore the condition of these potatoes when they arrived at Dumesnil on another carrier and that sort of thing is absolutely incompetent, irrelevant and immaterial, and they are trying to make us live up to a contract which Marshall & Kelsey had with the government, which was entirely a foreign party to us as far as we were concerned.

Mr. Hall: I object to all this testimony in these depositions and ask to have it stricken out for that reason.

The Court: Well, go on, I will overrule the objection.

Q. Will you please read into the record the material parts of the contract which you had with Marshall & Kelsey for the November supply of potatoes for Camp Taylor?

A. On October 10th, a proposal was sent to Marshall & Kelsey and to others which states as follows:

"Sealed proposals in triplicate, subject to usual conditions, will be received here until 11 A. M., October 20th, 1917, and then opened in the presence of attending bidders for furnishing and delivering subsistence supplies as indicated below, in quantities as required at this Cantonment from time to time during the calendar month of November, 1917."

Under the heading of potatoes the following was quoted: "Potatoes, fresh to conform to specifications, serial No. 46, Q. M. C. Form No. 120, March 19th, 1917, as amended by instructions Quartermaster General's Office Sept. 20th, 1917, as follows:

This grade shall consist of sound potatoes of similar varietal characteristics, which are practically free from dirt or other foreign matter, frost injury, sunburn, second growths, cuts, scab blight, dry rot and damage caused by disease insects or mechanical means. The minimum diameter of potatoes of the round varieties shall be one and seven-eighths ( $1\frac{7}{8}$ ) inches, and of potatoes of the long varieties one and three-fourths ( $1\frac{3}{4}$ ) inches. In order to allow for variations

incident to commercial grading and handling, five per centum by weight of any lot may be under the prescribed size, and, in addition, three per centum by weight of any such lot may be below the remaining requirements of this grade, in commercial packages. Exact quantities cannot be determined in advance."

The proposal further states that further information if available would be furnished upon application.

This proposal was sent as indicated to Marshall & Kelsey, and Marshall & Kelsey and F. E. Kelsey agreed to furnish approximately 1,250,000 pounds fresh potatoes according to Government specifications at \$.0274.

This proposal was accepted on Oct. 23d and a copy of the acceptance was sent to Marshall & Kelsey.

6. Under that proposal and acceptance Marshall & Kelsey did ship various cars of potatoes into the camp?

A. They did.

7. Will you just briefly explain what is the meaning of the proposal for supplies for the month, for instance in this case the month of November?

A. We were at that particular time unable to tell the exact quantity that would be required owing to the fact that the draft for this camp had not all come in and we gave them, in order to bid  
125 intelligently, an approximate number of pounds that would be required. This quantity might be more or less according to the number of men that we were required to feed. He was not supposed to exceed, nor would he be permitted to exceed the amount of his contract, unless it developed toward the end of his contract that the new contractor for the following month would not be able to get potatoes in on time, in which case it might be permitted the contractor for the preceding month, if he had potatoes on hand, to furnish the amount which would be required to carry us, until we could get potatoes in on the new contract. This would apply particularly if the local market was short, or if the price of the local market were higher than the price at which the contractor agreed to furnish on his contract.

8. In order to take in more than the contract quantity it would in fact be a new contract for the goods, would it not?

A. No, it has not been considered that. We have authority under conditions that I have described to permit a contractor to exceed the amount of his contract as indicated. That is, for a small amount; enough to keep our men fed and only under the conditions I have given you. We could not normally permit him or any contractor to simply put into our warehouse anything he had on hand. Nor would we permit it.

9. As a matter of fact in November you made a contract for your December supply of potatoes?

A. On November 20th bids were opened for December.

12. Colonel, under your proposal and acceptance, how were these goods to be billed to the camp here as far as you were concerned?

A. They should have been billed direct to the Camp Quartermaster Camp Taylor. This particular acceptance of Marshall & Kelsey to furnish potatoes for the month of November states:

126 "Under above proposal subject to advertisement, conditions and specifications therein cited, acceptance is hereby made for supply and delivery to the Quartermaster in quantities as required at station, at prices stated."

That means that Kelsey had to deliver potatoes at the prices he proposed f. o. b. Camp Taylor.

13. And on what kind of billing?

A. On commercial bill of lading.

14. In your agreement with Marshall & Kelsey were you to pay for these potatoes before they were unloaded?

A. Most assuredly not.

Q. Did you know anything about the arrangements made with the shippers of these potatoes, their terms of sale and how the potatoes were to be paid for by Marshall & Kelsey?

A. I know nothing at all about any arrangements made by Marshall & Kelsey with anybody. We look as to Marshall & Kelsey for the delivery of potatoes up to government specifications and when he delivered the potatoes, we were to pay for them.

"Concerning the sorting of potatoes by Mr. Witkop, Mr. Conger and Mr. Sandberg, I gave instructions to Captain Henson to the effect that the sorting of the potatoes didn't concern us in the least, and until the potatoes were sorted and put up to us for acceptance, we had nothing whatever to do with them. Labor was extremely hard to get and our labor bureau was authorized to procure such labor as they thought they needed for this work. With reference to my testimony under direct examination that some of the potatoes were frost-bitten I mean that my recollection of the weather at that time is that it was extremely cold weather and I thought that the potatoes had been frosted en route, but I am unable to tell whether they were frosted en route or in the field, I do not know. Our pay vouchers show that Marshall & Kelsey delivered and were paid for 1,053,104 pounds of potatoes during the month of November, 1917.

127 "Upon cross examination of the witness Pearson, counsel for plaintiff asked him what is known as question No. 18, which was answered at the time of the taking of the depositions, and at the time of the taking of the deposition, and after the witness had answered question No. 16, the following occurred:

Mr. Waer: For the purpose of the record I ask that the question and answer be stricken out as incompetent.

Upon the reading of the deposition at the time of the trial the following occurred:



Mr. Hall: I will withdraw question 16.

Mr. Waer: I ask that it be read and the answer to it.

Mr. Hall: I have a right to withdraw the question.

Mr. Waer: I ask that I be permitted to read it then to the court and jury.

Mr. Hall: Mr. Waer moved to strike it out and I withdrew the question.

The Court: Well, if you don't want to read it, let it stand and Mr. Waer may read it. I ruled a few moments ago that you need not read it. Go on; Mr. Waer, if he thinks it is competent, he may read it.

(Whereupon Mr. Hall completed the reading of the deposition of Col. Pearson.)

Mr. Waer: I read first question 16.

Mr. Hall: I withdrew the question and the answer is incompetent, and I withdrew the question before Waer objected to it and move to strike it out. It certainly is not competent.

The Court: I will sustain the objection. The question is a statement of what counsel claimed the facts to be and the answer is clearly incompetent, and the only purpose of the question being incorporated into this record would be to get some statement by way of admission.

Mr. Waer: We ask, if the court please, that it be read  
128 as a declaration against interest, if for no other reason.

The Court: I have sustained the objection.

The question was as follows:

Q. I will state what we claim to be the facts in this case. Marshall & Kelsey purchased 40 cars of potatoes from H. Moseley of Grand Rapids, Michigan, cars to be loaded to capacity preferably and 1,000 bushels to the car, sale price to be 2.63 per hundredweight, less freight rate from Michigan to Indianapolis, Indiana, cars to be shipped on order bill of lading to the order of the shipper, destination, Louisville, Kentucky, notifying Marshall & Kelsey, care of the Quartermaster Camp Zachary Taylor, draft for the purchase price to be drawn on Marshall & Kelsey and attached to the original order bill of lading and forwarded to Commercial National Bank of Indianapolis, Indiana. Cars were so shipped with the exception of the Conger cars, which were billed directly to Dumesnil on later instructions. The order bill of lading with draft attached was deposited by French & Co. and Reed & Cheney Co. in their respective banks at Grand Rapids, and they received full credit as a deposit for the amount of the draft on the cars. Conger's draft with the order bills were mailed directly and by him to the Commercial National Bank, upon receipt of these bills of lading with the drafts attached by the Commercial National Bank it detached the bills of lading from the drafts and delivered them to Marshall & Kelsey without requiring the payment of the drafts or any money thereon, and Kelsey brought the bills of lading to Camp Taylor and delivered them to the agent of the Southern Railway Co. at this camp. The terminal railroads

at Louisville changed the billing on the cars billed to Louisville by scratching out Louisville and writing on the billing the words "Camp Taylor." Did you know any of those facts?

129 A. I did not until a few days ago when a representative from the railway company came to me and told me that was what had happened.

The deposition of Sergeant JAMES V. WILSON taken at Camp Zachary Taylor, was read in evidence as follows:

My name is James Victor Wilson, and I am sergeant and have charge of warehouse No. 7. I was sergeant some time during the month of November, when it appears that certain potatoes were received at Camp Taylor under contract with Marshall & Kelsey. I had charge of the men who opened the cars and took from ten to fifty bags out of each car for inspection. These cars that I speak of were rejected at that time. Part of the cars were sorted and the government accepted the good potatoes in those cars. The other cars were entirely rejected after examination. I remember that Mr. Whitkop was the first gentleman who came here with reference to these potatoes. He said the condition of the potatoes was caused by field frost. I assisted in the inspection of all the cars which were received during November under that contract, and the same trouble existed with reference to each as to the condition of the potatoes.

Cross-examination.

By Mr. Hall:

Each of these cars were sorted separately and after the potatoes from each car had been sorted those potatoes were weighed by themselves.

Q. What I am getting at is this. Sergeant, L. & N. car 4890 came in here before Witkop got down. It was reported as rejected; it was placed on the switch track, then car M. & O. 17420 came in and was inspected and reported rejected; it was afterward sorted and taken. Can you tell us whether there was any difference in those two cars upon their first inspection?

A. No, sir, I cannot.

Q. That is true of all the cars, is it not?

A. If you refer to any one car it is.

130 Captain Henson was the one who had the final say as to whether the cars should be accepted or rejected. The first experience I had in inspecting potatoes in car lots after they had been in transit about a week, commenced August 29, 1917. There were about 280 sacks in these cars on an average.

PETER WHITKOP recalled by the plaintiff.

Direct examination by Mr. Hall:

I have heard the testimony of Captain Henson. While I was at Camp Taylor I sorted three of the cars shipped by J. F. French &

Company. This paper is a report of the sorting and a record which I made at that time. The first car sorted was N. Y. C. No. 153065. It was invoiced at 394 sacks. That would be 59,101 pounds, the loading weight. Three per cent of that would be approximately 1,700 pounds, a little over 1,700 pounds. The outturn weight of that car after I had sorted it was 386 sacks, or 57,504 pounds. That is the amount the government took and paid for. The shrinkage was 1,596 pounds. It did not shrink 3 per cent, but the total shrinkage was approximately 200 pounds less than 3 per cent.

I also sorted N. Y. C. car No. 315372, invoiced at 310 sacks, weight of 46,500 pounds, checked out 307 sacks, 45,157 pounds. It shrank 1333 pounds, which is less than 3 per cent.

The next car was Erie No. 88561 400 sacks or 60,000 pounds; shrinkage of two sacks or 1,299 pounds. That shrunk 501 pounds less than 3 per cent. All of the cars that I sorted that were shipped by French & Company shrunk less than the 3 per cent allowed under the Government specifications.

I have been engaged in the potato business about nine years and in the inspection and handling of potatoes at the end of transportation point or destination, about five years; I have been doing that  
131 continuously during the northern potato season. During the sorting I told Captain Henson they were not shrinking three per cent; told him how much they were shrinking. He said he thought they would go more than that; looked worse than that to him. I saw and talked with Captain Henson and saw him look at cars of potatoes and that sort of thing.

I saw N. Y. C. car No 151473 and looked at it. I would say at the time I looked at it it had not been disturbed whatever. I can tell that by the fact that potatoes shipped from Michigan to Louisville, or that distance, naturally settled down and become uniformly packed in the cars, and when you disturb those sacks of potatoes, it is not easy to get them back in the same form that they were. Therefore, it is easily seen whether a car of stuff has been disturbed or not. It didn't look to me as though it had been disturbed. There would be a natural shrinkage of potatoes which were loaded at Bailey in good condition by the time they arrived at Louisville. That shrinkage is two per cent, so figured by potato dealers. I would say the degree of field frost in the cars of potatoes which I sorted was very small. In sorting these three cars I stored all sacks that showed spots due to rot. When I looked at car No. 151473 the car looked as good or even better than the cars that I had sorted. When Captain Henson and Captain Croshaw told me they would not take any more potatoes after the 28th of November they said their contract had expired; they had no more room, and they had other potatoes coming in from the next month's contract. I saw all of the cars of potatoes belonging to French, and to Conger and to Reed & Cheney which were unloaded after I got there. I heard the testimony of Sergeant Wilson that the average amount of potatoes in these cars were 280 sacks. The cars were loaded heavier  
132 than that; they ran from 300 to 400 sacks. There was no car that had any less than 300 sacks in it and some of them went up as far as 400.

Cross-examination.

By Mr. Waer:

I got to Camp Taylor on November 19th. I know that car No. 151473 arrived at Camp Taylor either shortly before or shortly after I got there. I saw it within several days after I got there. It might have been more than two or three days. I don't remember the date I saw it. I didn't see them take any of the potatoes out of the car and look at it. I didn't know they had rejected the car. It had never been rejected to my notion. I know the government didn't take it, whether they rejected it or not. They didn't tell me they wouldn't take it because it had rotten potatoes in it. Not that car—we didn't get to it. They told me they wouldn't take it. I got in the car No. 151473 and made an inspection. I got on top of the potatoes and pulled some of the sacks out and down in the doorway. The potatoes were piled in the ends. There might have been a few sacks piled in the middle, but not to hinder me in doing my work. I was not there when the soldiers took the potatoes out of this particular car so that I could see any particular lot.

Redirect examination:

I don't know that the soldiers ever did take the potatoes out of that car. It didn't look like it to me.

Q. Could the sacks have been in the condition in which you found them, when you looked at them, if they had been previously taken out after the car had arrived at Camp Taylor?

A. Not unless they were very cautious about taking them out and putting them back, which they were not on other cars.

No one told me before November 28th that N. Y. C. car No. 151473 was rejected.

On November 28th the government did not reject the remaining cars that were on track. On that date they told me they would not take any more of the cars that were on track; that was because they had completed their contract, and car No. 151473 was not in any different class than the others in that regard, than the others that were on track at that time.

Recross-examination:

I inspected this car before November 28th. I knew the car was there. I did not know it was rejected. I went down there to examine everything that was there.

Redirect examination:

Q. Now, what was the car numbers which you were notified had been rejected and you went down to see?

A. I can't recall the car numbers. I think your records will tell—the telegram.

Q. To refresh your recollection, I will ask you if it was C. & O. No. 9021?

A. I recall that was the car number.

Q. Yes, and did you know anything about this car being rejected or anything like that before you went down?

A. No, sir.

Q. You did have a specific car number as having been rejected when you went?

A. Yes, sir.

Recross-examination:

Q. What occasion was there for examining this car that had been rejected by the government?

A. I wanted to know how the situation looked.

JAMES L. BINDNER recalled for cross-examination.

Cross-examination.

By Mr. Hall:

Q. (Showing witness paper.) I show you this paper and ask you if you wrote and caused that to be forwarded to Mr. Moseley?

A. Yes, sir.

Q. On the date that it bears?

A. December 4th.

Mr. Hall: I offer it in evidence.

Mr. Waer: I want to ask one preliminary question.

Q. (Showing witness paper.) I show you this paper.

Mr. Hall: All right.

Mr. Waer: Did Mr. Kelsey ask you to wire Moseley?

134 A. Yes, sir.

"H. ELMER MOSELEY, a witness produced by the plaintiff.

Examined by Mr. Hall:

I am a produce broker. I was the person who made the deal with Marshall & Kelsey for the Camp Taylor potatoes in November.

Q. (Showing witness paper.) Now I will ask you if you received that wire in the regular course of business from the Western Union?

A. Yes, sir.

Mr. Hall: I will read the material parts: December 4, 1917. P. M. 5:57, R. W. Camp Taylor, Kentucky, H. Elmer Moseley, Association Commerce Building, Grand Rapids, Michigan. Following cars of potatoes rejected on track. Then it gives a list of twelve or fourteen there, and one car here, this car in question, 151475. (Signed) E. V. Baker, Agent, Southern Railway.

Q. What can you say as to any former official notice of any kind from anybody concerning that car before you received that wire?

A. I think this is the only notification I had from any agent regarding the rejection of any car.

Q. Regarding the rejection of this particular car, N. V. C. 151473?

A. This car or any other car.

Cross-examination:

Mr. Kelsey sent me some notices of rejection of some cars, a week or so before I got this notice.

Redirect examination:

Q. But not on this particular car?

A. I wouldn't say. I have not the records with me.

Q. What is your recollecting in that regard as to this being the first notice from anybody of this particular car?

A. The number does not look familiar at all.

J. F. FRENCH recalled for the plaintiffs.

Q. When was the first time that you received any notice that N. V. C. car No. 151473 had been rejected.

15 A. December 5th.

Q. And from whom did you receive it?

A. H. E. Moseley.

Whereupon, the proofs were closed.

Mr. Woot: At this time, may it please the court, we move the court to direct a verdict for the defendant on the ground that under the undisputed evidence in the case and under all the facts in the case which appear undisputed, it is shown that the Pere Marquette through the delivering carrier, the Big Four, made a delivery of this car in question to a person in possession of the bill of lading, which it was entitled to do under the statute, and the plaintiff in this case not being a bona fide holder of the bill of lading and not coming within the provisions of the sections of the act of Congress which I called your Honor's attention to this morning, cannot recover. The motion is the same as the one made at the close of the plaintiff's case, except in this particular: We claimed at that time that the burden was upon the plaintiff to establish a wrongful delivery by the railroad company. We claim now that the plaintiff not only has failed to establish a wrongful delivery by the railroad company, the Big Four, but that under the undisputed evidence in the case, the court must direct a verdict, because now, under the undisputed evidence, it appears that the Big Four Railroad Company made delivery of this car to a person in possession of the bill of lading, and therefore made a lawful delivery under the uniform bill of lading act, this bill of lading having been endorsed in blank, being a negotiable order bill of lading, its negotiation not being restricted in any way by anything appearing on its face, and the railroad company thereby being protected under the statute in making delivery to anyone in

possession of the bill of lading; and no liability can accrue against the railroad company except in favor of someone who, if the bill of lading was not surrendered to the railroad company, delivering carrier, obtained it thereafter in good faith for value without knowledge of the facts concerning the movement of the car prior to that time, and who was, under the law, a bona fide holder of the bill of lading. I might say in our opinion, if the court please, the question of the wrongful delivery is a question of law for the court from the standpoint of the defendant because the testimony is undisputed. It appears from the record and all the testimony that at the time the Big Four delivered this car, the Southern Railway or its agent held the bill of lading, and the Southern Railway or its agent—it doesn't make any difference the agent—but the person in possession of the bill of lading endorsed in blank by its consignee, they were absolutely protected; they were not required to surrender the bill of lading and the only penalty they might incur was that they might be liable to make a delivery to a person who was a bona fide holder for value.

The Court: Now, what is your motion?

Mr. Hall: I move to strike out all the testimony of these persons, Capt. Benson, Col. Pearson and Sergt. Wilson. There is no testimony that they inspected the *the* car in question in person. There is no testimony that they rejected it on account of bad condition. They don't say that they inspected this particular car. It is a blanket proposition. The record shows what cars they rejected, but it doesn't show this car. The testimony is uncontradicted that the first notice we received was from the agent of the Southern on December 4th, and that was communicated to Mr. French on December 5th. Anyway, Your Honor, and so the testimony should be struck out. Now there is not any proper testimony as to condition, and further than that, the testimony of the camp witnesses themselves shows that the three cars which they rejected should not have been rejected under the government specification, which allows three per cent of waste for frost injury, and the uncontradicted evidence is also that this car was fully as good, if not better than, the three cars which were rejected wrongfully because they did not fall below the specification. Now, in addition to that, your Honor, the testimony is not competent because they took that car out wrongfully and they did not notify us until the 4th day of December. Then we undertook to handle it for the benefit of all concerned to make the loss as light as possible. It was not what the condition of that car was on November 18 or on any day after that up to December 4th. We were not interested in that. The only question is as stated by the court, did we use due diligence and act in good faith and get the best possible results out of the car in the condition that it was when we undertook to handle it. That is absolutely the only question now. The evidence is uncontradicted. Mr. French's testimony is absolutely uncontradicted that we did not use our best efforts and that sort of thing. Now, I move to direct a verdict for the plaintiff because under the undisputed evidence the car

was misdelivered by the terminal carrier, delivered to a person who had unlawfully—who was not entitled to the property, and that the bill of lading was not produced or surrendered to the terminal carrier, and it never had it in its possession; and the evidence as to its return being undisputed, that the plaintiff is entitled to a directed verdict for the amount of the claim as shown by the testimony, \$675.00 and some cents with interest, interest on the full amount of the draft from November 18th to December 18th, and arrest on the \$675.00 from December 18th to date."

The Court: Well, gentlemen, this has been a very interesting case—presenting in a novel way the question as to the respective rights of shipper and carrier under the federal statute but taking the testimony as it stands under the two motions that have been made, diametrically opposite in character and calling for opposite results, both sides admitting that the questions involved are questions of law rather than questions of fact, I think perhaps the court ought to agree with counsel on that proposition.

It is fair to assume that had the witness Smith of the Big Four Railway Company known that the witness Bindner, the cashier of the Southern Railway Company at Dumesnil, held the order bill of lading in question only as the agent of Kebeey and not as the agent of the Southern Railway Company, he would never have rebilled the car in question to Dumesnil, and delivered it to the Southern Railway Company for transmission to that point. The contract between the consignor and the carrier in this case ended when the car arrived at its destination, Louisville, and the proper notice of its arrival was given to the parties named. It is perfectly manifest that if that was the contract between the consignor and the carrier in this case, the Dumesnil was not a party to the contract by which this car in question was rebilled to Dumesnil by the agent of the Big Four Railway Company. The possession of the order bill of lading in controversy by Bindner was only temporary; he was merely its bailee; he was to return it to Kebeey when it was called for, and he did so return it shortly after I received it. From his own testimony, his possession was not for the purpose of securing possession of this car from the carrier either in his own behalf, in behalf of Kebeey, or in behalf of the Southern Railway Company. Whatever may have led him to communicate with Smith, the agent of the Big Four, is left somewhat in doubt by the testimony. Nevertheless, his notification to Smith that he had the bill of lading and his directions to Smith to forward the car to Dumesnil was misleading and in its essential elements untrue so far as it led Smith to believe he had my authority to make such a demand. Smith was clearly deceived by the conduct of Bindner. True, Bindner held the order bill of lading in question, but not for any such purpose as he used it. How Kebeey came into its possession does not appear so far as I recall the testimony. It does appear, however, that the draft attached to it was never paid; that both the draft and the bill of lading were later returned to the bank in Grand Rapids where the draft was taken care of by the plaintiff. The plaintiff in this case claims that there was



a wrongful delivery of this car by the Big Four Railway Company, the terminal carrier, at Louisville to the Southern Railway Company. That a lawful delivery could not be made to anyone except upon the presentation and surrender of the order bill of lading duly endorsed by the consignee. The defendant contends, on the other hand, that there was a lawful delivery to the Southern Railway Company, because the cashier of that company at Dumesnil actually had in his possession at his office the identical order in question.

It seems to me that this position of the defendant ignores at least two of the undisputed facts in this case: First, that the Southern Railway Company never had possession of this bill of lading, taking the statement of Bindner as controlling, and there is no other testimony in the record in relation to it; and secondly, that Bindner never held possession of the bill of lading for any such purpose as it was used. In my judgment, whether intended or not, a palpable fraud was perpetrated on the Big Four agent to secure the transfer of this car beyond its destination.

The statute which is controlling in this case calls, in my  
140 judgment, for the surrender of the bill of lading to the terminal carrier on a delivery being made; at least, it calls for the exercise of that care in making a delivery which would lead a reasonably prudent person to believe that the person having the bill of lading was holding it in good faith.

But, should the defendant's interpretation of this statute be adopted, under the undisputed facts in this case the delivery of the car to the Southern Railway Company would not be justified because that company did not have possession of the bill of lading in question. The manifest purpose of this statute is to protect the shipper against misconduct and fraud on the part of either the purchaser, the common carrier or anyone else. This purpose, in my judgment, would be utterly subverted if the terminal carrier could lawfully make a delivery to someone not entitled to it upon the mere oral representation as to a right without any facts to sustain it. In this case the agent of the Big Four Railroad Company frankly says that he made no other inquiry than the mere statement of Bindner that he had the bill of lading down at Dumesnil; and further he states that his instructions are, in cases of this kind, not to make a delivery without the surrender of the bill of lading, but he excuses his conduct in this case by saying that he thought a transfer to the Southern Railway Company on the representation of Bindner would be all right, and, following this impulse, he changed the waybill and caused the delivery of this car to be made to the Southern Railway Company, destined for Dumesnil.

It follows that, in my judgment, under the undisputed facts, the delivery of this car of potatoes by the Big Four Railway Company to the Southern Railway Company was unauthorized and constituted  
a conversion of the car and its contents as a matter of law.

141 The only question, therefore, for the consideration of this jury, if it is to be submitted to the jury at all, is the question of damages. On this question, the plaintiffs would be entitled under their contract, to recover the invoice price had they not later

taken possession of this car and disposed of its contents. Having taken possession of the car and disposed of its contents, the defendant is entitled to a credit on the invoice price for the amount received less the necessary expenses incurred in so disposing of the contents of the car. That bears upon the good faith of the plaintiff, and it may be that that question should be submitted to the jury as to whether or not the plaintiff in good faith sought to dispose of the car to the best advantage possible under all the circumstances to the end that the damages against the defendant might be minimized as much as possible.

So the motion of the defendant is overruled, and so far as the motion of the plaintiff is concerned to strike out the testimony, it does not seem to me that under the instructions I will give the jury, it will cut much figure anyhow.

Mr. Waer: If the court please, I do not, of course, wish to argue this matter after your Honor has made a decision, but it is a matter of such vital importance that I do want to call your Honor's attention to the fact that your Honor has destroyed the negotiability of the bill of lading by your decision and ignored the provisions of the act of Congress regarding bills of lading. If the party had negotiated the bill of lading and the statute says he may, any person, the law says, that is in possession, may be presumed to be entitled to it; men that destroys the negotiability of bills of lading.

The Court: Well, I have given my best judgment on the question, and I do not intend to destroy the negotiability of such an instrument nor do I intend to rule contrary to the provisions of a federal statute.

142 Mr. Waer: If your Honor will study the matter, you will find that you have done so, that you have destroyed the negotiability of bills of lading. I mention it in this way because of the seriousness of that question.

The Court: Well, up to date I feel satisfied with my conclusion. Take a recess until tomorrow morning.

Mr. Hall: Just a minute. Do you claim anything on the measure of damages?

Mr. Waer: Claim that that is a question for the jury in view of your Honor's ruling, whether or not the damages claimed to have been suffered by the plaintiff arose after the delivery of the car.

The Court: Well, I have overruled that claim, haven't I?

Mr. Hall: Yes, that is overruled. He says the only question is whether we acted in good faith.

Mr. Waer: Well, I claim on that, you did not act in good faith and that that is a question for the jury.

Mr. Hall: All right.

Whereupon the court adjourned until half past nine o'clock the next morning.

*Defendant's Requests to Charge.*

1. The Court instructs you that this action is brought under the so-called Carmack Amendment to the Interstate Commerce Act (Sec. 20 of said act), the defendant being sued as the initial carrier of a shipment of a carload of potatoes moving from Bailey, Michigan, to Louisville, Kentucky, over the Pere Marquette Railroad, the initial carrier, and over the Big Four the connecting and terminal carrier. This case therefore involves a construction of the said Carmack Amendment, and it also involves a construction of the so-called Uniform Bills of Lading Act, being Act of Congress of August 29, 1916,

and federal questions are presented for determination. The 143 Uniform Bills of Lading Act provides in part as follows:

(Act Aug. 29, 1916, c. 415, Sec. 9.) A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (39 Stat.)

(Act Aug. 29, 1916, c. 415, Sec. 10.) Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such requests or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (39 Stat.)

144 (Act Aug. 29, 1916, c. 415, Sec. 11.) Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiations of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired

title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (30 Stat.)”

The evidence in this case as to the question of delivery is undisputed, and the question of whether or not there was a rightful or wrongful delivery of the car in question is therefore a question of law for the court. The undisputed evidence in the case shows that the Big Four Railroad Company, the terminal carrier named in the negotiable bill of lading under which the shipment in question moved, delivered the car in question upon its arrival at destination to a person in possession of the order bill of lading for the goods which had been endorsed in blank by the consignee without any notice or knowledge at the time of the delivery that the person to whom delivery was made was not lawfully entitled to the possession of the goods. The court instructs you, as a matter of law, that the terminal carrier, the Big Four Railroad, was justified in making such a delivery, and that the contract of carriage was thereupon performed so that all liability of the defendant in this case as initial carrier ceased.

2. The Court further instructs you that the plaintiff in this case is the original shipper and the original consignee named in the negotiable order bill of lading which was endorsed in blank, and the plaintiff does not by its declaration, and cannot, claim that it is bringing this suit as a good faith purchaser for value of the bill of lading. As the plaintiff is not a good faith purchaser for value of the bill of lading in question, it cannot recover against the defendant on the ground that the terminal carrier, the Big Four Railroad Co., failed to take up and cancel the bill when it made delivery of the car to the person in possession of the bill endorsed in blank by the consignee. The failure of the terminal carrier to take up and cancel the bill upon delivery of the car to the person in possession of the bill imposes no liability upon either the terminal carrier or the initial carrier, except to a good faith purchaser for value of the negotiable bill of lading. The plaintiff in this case not claiming by its declaration to be such good faith purchaser for value, and not showing in any way that it is such good faith purchaser for value, your verdict must be for the defendant.

**NORRIS, McPHERSON, HARRINGTON & WAER,**

*Attorneys for Defendant.*

*Charge to the Jury.*

The Court: Gentlemen of the jury, for reasons which I stated of record last night at the conclusion of a motion on the part of each counsel to direct a verdict, your attention will be called exclusively to the question of the plaintiff's damages. I have held as a matter of law under the undisputed facts in this case that this carload of potatoes was unlawfully delivered by the terminal carrier, the Big Four, at Louisville, Kentucky, to the Southern Railway Company, and that

that unlawful delivery constituted a conversion of this car on the part of the common carrier giving the plaintiffs the right to recover damages against the initial carrier, the Pere Marquette Railway Company, the defendant in this case, for such conversion; and it is unnecessary at this time to go further into the reasons for the court's conclusion in that matter. As to whether or not the car was unlawfully delivered, you will have nothing to do in your consideration of this case, and, as I said, you will confine your considerations of the evidence in this case to the question of damages solely.

The invoice price of these potatoes loaded upon this car in question, less the freight charges to Indianapolis, was \$1,086.76. The destination of the car was Louisville. It arrived at Louisville November 9, 1917. On November 13, 1917, the car was rebilled by the agent of the Big Four Railway Company to Dumesnil, a station of the Southern Railway some distance beyond Louisville, and was delivered to that railway company to be carried to such new destination. It arrived at Dumesnil November 19, 1917. On or about December 5, 1917, the plaintiffs took possession of the car and disposed of its contents realizing therefor the gross sum of \$743.85. The freight and other charges claimed to have been paid by the plaintiffs in disposing of the car amount to \$332.39, making the net receipts for the car or its contents, \$411.46. This sum of \$411.46 the plaintiffs admit the defendant is entitled to credit for. Deducting that sum from the invoice price, leaves a balance of \$675.2529 cents, which is the amount the plaintiffs claim they are entitled to a judgment for in this case, together with interest thereon at the rate of five per cent from November 18, 1917, to date, and it is the claim that that interest amounts to \$13.91.

Mr. Hall: That would not be right your Honor. I figured interest on the entire invoice price for a month, you see, from November 18th to December 18th, and then the interest on 675.00 from December 18th when the car got to Memphis, to date.

147 The Court: Well, with that modification, which I adopt you will consider the question of interest.

The questions for you to determine are first, whether under the facts shown by the evidence in this case the value of these potatoes was as stated in the invoice, \$1,086.75, at the time they were shipped from Bailey, Michigan on or about November 3, 1917; and second whether the plaintiffs exercised diligence and reasonable care in disposing of this car of potatoes and obtaining therefor the largest price possible under the circumstances, taking into consideration the facts disclosed by the evidence in this case; third, as to whether or not the items of expense claimed in disposing of this car—that is, its contents, are reasonable and just. I instruct you that the duty rested upon the plaintiff to obtain the highest price possible under the circumstances and to exercise reasonable care and diligence to that end. So that the damage accruing against the defendant might be reduced to the minimum. Each of these questions are question of fact for your determination under the evidence.

The burden of proof rests upon the plaintiff to show, first, the value of these potatoes at the time of shipment, and in this connec-

tion you may consider the invoice price fixed at the time of shipment and the other facts and circumstances in the case which you find to be true; second, what was actually done by the plaintiffs in disposing of this car and its contents, whether due care was used by the plaintiffs to minimize the defendant's damages as much as possible; and third, as to whether or not the items of expense claimed to have been paid out are reasonable and just to be charged up against this defendant. I have given you the various items constituting the plaintiff's claim in these particulars. You will remember these items not alone from the instructions given you by the court, but from the evidence in this case.

148 If you find for the plaintiffs, you will determine the value of these potatoes at the time of shipment under the evidence and deduct therefrom the reasonable costs and charges—no, just strike that out. You will ascertain the value of these potatoes at the time of shipment, giving the defendant credit for the proceeds of the car less the reasonable expense of disposing of the car and its contents and render a verdict for the plaintiffs for the balance together with the interest at the rate of five per cent.

Mr. Waer: If the court please, does your Honor mean the proceeds that they should have realized if they find they used due diligence?

The Court: Yes, that is what I mean, the proceeds they should have realized from this car by the exercise of due care and diligence in disposing of it, and render your verdict for the balance, whatever that sum may be, to which should be added the interest at five per cent as I have stated.

#### *Calendar Entry of Judgment.*

At a General Term of the Circuit Court for the County of Kent.  
Continued and held in the Court House, in the City of Grand Rapids, in said County, Thursday, March 28, 1919.

Present, Hon. Willis B. Perkins, Circuit Judge.

The Court was opened for business in due form.

No. 25,364.

J. F. FRENCH & Co., Composed of Jay F. French and John Wallace,  
Plaintiff,

vs.

PERE MARQUETTE RY. Co., Defendant.

149 In this cause, the parties by their respective attorneys and the jury heretofore duly empaneled being present in court, the trial was resumed and said jury sat together and after hearing the conclusion of the proofs and allegations of the parties, arguments of counsel and the charge of the Court, retired from the

bar under charge of Wm. E. Grove, an officer of the Court duly sworn for that purpose, to consider of their verdict to be given, and after being absent for a time, returned into court and say upon their oath that said defendant did undertake and promise in manner and form as plaintiffs have in their declaration in this cause alleged, and assess the damages of said plaintiffs on occasion of the premises, over and above their cost and charges by them about their suit in this behalf expended in the sum of \$689.20. Therefore, it is ordered and adjudged by the Court now here that said plaintiffs do recover against defendant their damages aforesaid together with their costs and charges aforesaid, to be taxed, and that plaintiff have execution therefor.

It is further ordered that all proceedings herein be and same are hereby stayed for a period of twenty days to enable defendant to move for a new trial, settle a bill of exceptions or take such other steps in the premises as it may deem advisable.

The Court here adjourned until tomorrow at 9:30 o'clock A. M.

Read, approved and signed in open court.

WILLIS B. PERKINS,  
*Circuit Judge.*

*Calendar Entries.*

1918.

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|------|-----|--|
| Jan. | 26. | Declaration and Notice filed.  |
|      | 26. | Copy Declaration, Notice and Proof of Service filed.   |
| Mar. | 12. | Plea and Notice filed.   |
|      | 20. | Depositions filed.   |
| 150  | 20. | Depositions filed.   |
|      | 20. | Notice to Produce filed.   |
|      | 26. | Stipulation filed.   |
|      | 28. | Request to Charge filed.   |
|      | 26. | Trial commenced before jury.   |
|      | 27. | Trial resumed.   |
|      | 28. | Trial concluded. Verdict for plaintiff for \$689.20 and costs. Proceedings stayed twenty days. |
|      | 30. | Tax Bill of Costs filed.   |
| Apr. | 16. | Order for Transcript filed.  |
|      | 12. | Time for settling Bill of Exceptions extended sixty days.                                      |
| June | 10. | Stipulation filed and Order entered extending time to July 9.                                  |
| July | 5.  | Stipulation filed and Order entered extending time to July 19.                                 |
|      | 17. | Stipulation filed and Order entered extending time to July 29, 1918.                           |
|      | 29. | Stipulation filed and Order entered extending time to Aug. 8, 1918.                            |

The exceptions taken at said trial not appearing in the record of said cause, the Honorable Willis B. Perkins, Judge of the Circuit Court for the County of Kent aforesaid, in pursuance of the statutes and rules in such cases made and provided, at the request of counsel for the defendant, and after due notice to the adverse party, has



settled this Bill of Exceptions, which contains the substance of all the testimony and the entire charge of the Court to the jury given upon said trial, and it is hereby certified that so far as said testimony is set out in the foregoing exceptions by questions and answer, it is necessary to a full understanding of the questions of law  
 151 thereby raised; and that the charge of the Court to the jury is set forth therein in full because it also is necessary to a full understanding of the questions of law thereby raised.

It is also certified that the assignments of error hereto attached were presented at the time of the signing of the Bill of Exceptions.

It is further certified that the several exhibits, copies of which are hereinbefore set forth, are in the form and contain the matters shown by such copies and are hereby incorporated in and made a part of this Bill of Exceptions and of the record in this cause with the same force and effect as if said exhibits had been inserted in or attached to the same.

It is further certified that the copy of the Pleadings, Calendar entries and Judgment entry are true copies of the originals on file and are attached to the Bill of Exceptions pursuant to and in the manner provided by Rule 68 of the Michigan Court Rules.

Signed this 5th day of August, A. D. 1918.

WILLIS B. PERKINS,

*Circuit Judge.*

*Assignments of Error.*

Now comes the above named defendant by Parker, Shields & Brown, of Detroit, and Oscar E. Waer of Grand Rapids, its attorneys and says that the record and proceedings in this cause and in the rulings and the charge of the court as given, and the refusal of the court to charge as requested, manifest errors have intervened to the injury and detriment of said defendant, whereof it specifically assigns the following:

1. The court erred in denying defendant's motion for a directed verdict made at the close of the plaintiff's proof, on the ground that the plaintiff had made out no case against the defendant, the shipment in question being an interstate shipment governed by  
 152 the so-called Carmack Amendment, and moving under an order bill of lading governed by the Uniform Bills of Lading Act (Act of Congress of Aug. 29, 1916,) and the plaintiff not having shown that the Pere Marquette Railway Company, the initial carrier, or any connecting or delivering carrier, had been in any way negligent in the handling of the shipment, or that there had been any improper or unlawful delivery of the said shipment by the delivering carrier to a person or person- not in possession of the order bill of the evidence in the case the Big Four Railroad Co., the consignee.

2. The court erred in denying the defendant's motion for a directed verdict for the defendant made at the close of the testimony, on the ground that under the undisputed evidence in the case the Big Four Railroad Company, the of the evidence in the case the Big



*Four Railroad Company*, the terminal carrier named in the negotiable order bill of lading under which the shipment in question moved, delivered the car in question upon its arrival at destination to a person in possession of the order bill of lading endorsed in blank by the consignee, without any notice or knowledge at the time of the delivery that the person to whom delivery was made was not lawfully entitled to the possession of the car.

3. The court *erred* in refusing to instruct the jury as requested by defendant in its first request to charge, which was as follows:

"1. The court instructs you that this action is brought under the so-called Carmack Amendment to the Interstate Commerce Act (Sec. 20 of said act), the defendant being sued as the initial carrier of a shipment of a carload of potatoes moving from Bailey Michigan to Louisville Kentucky over the Pere Marquette Railroad the initial carrier and over the Big Four the connecting and terminal  
153 carrier. This case therefore involves a construction of the said Carmack Amendment, and it also involves a construction of the so-called Uniform Bill of Lading Act, being Act of Congress of August 20, 1916, and federal questions are presented for determination. The Uniform Bills of Lading Act provides in part as follows:

Act Aug. 29 1916, c. 415, Sec. 9). A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

- (a) A person lawfully entitled to the possession of the goods or
- (b) The consignee named in a straight bill for the goods, or
- (c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed by him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (39 State.)

(Act Aug. 29 1916, c. 415, Sec. 10.) Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (39 State.)

(Act Aug. 29 1916, c. 215, Sec. 11.) Except as provided in section twenty-six, and except when compelled by legal process if a carrier delivers goods for which an order bill had been issued the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (50 State.)

The evidence in this case as to the question of delivery is undisputed, and the question of whether or not there was a rightful or wrongful delivery of the car in question is therefore a question of law for the court. The undisputed evidence in the case shows that the Big Four Railroad Company, the terminal carrier named in the negotiable bill of lading under which the shipment in question moved, delivered the car in question upon its arrival at destination to a person in possession of the order bill of lading for the goods which had been endorsed in blank by the consignee without any notice or knowledge at the time of the delivery that the person to whom delivery was made was not lawfully entitled to the possession of the goods. The court instructs you, as a matter of law, that the terminal carrier, the Big Four Railroad, was justified in making such a delivery and that the contract of carriage was thereupon performed so that all liability of the defendant in this case as initial carrier ceased."

4. The court erred in refusing to instruct the jury as requested by defendant in its second request to charge, which was as follows:

"2. The Court further instructs you that the plaintiff in this case is the original shipper and the original consignee named in the negotiable order bill of lading which was endorsed in blank, and the plaintiff does not by its declaration, and cannot, claim that it is bringing this suit as a good faith purchaser for value of the bill of lading. As the plaintiff is not a good faith purchaser for value of the bill of lading in question it cannot recover against the defendant on the ground that the terminal carrier, the Big Four Railroad Co., failed to take up and cancel the bill when it made delivery of the car to the person in possession of the bill endorsed in blank by the consignee. The failure of the terminal carrier to take up and cancel the bill upon delivery of the car to the person in possession of the bill imposes no liability upon either the terminal carrier or the initial carrier, except to a good faith purchaser for value of the

negotiable bill of lading. The plaintiff in this case not claiming by its declaration to be such good faith purchaser for value, and not showing in any way that it is such good faith purchaser for value, your verdict must be for the defendant."

5. The court erred in instructing the jury as follows:

"Gentlemen of the jury, for reasons which I stated of record last night at the conclusion of a motion on the part of each counsel to direct a verdict, your attention will be called exclusively to the question of the plaintiff's damages. I have held as a matter of law under the undisputed facts in this case, that this carload of potatoes was unlawfully delivered by the terminal carrier, the Big Four, at Louisville Kentucky to the Southern Railway Company, and that that unlawful delivery constituted a conversion of this car on the part of the common carrier giving the plaintiffs the right to recover damages against the initial carrier, the Pere Marquette Rail-  
156 way Company, the defendant in this case, for such conversion and it is unnecessary at this time to go further into the reasons for the court's conclusion in that matter. As to whether or not the car was unlawfully delivered, you will have nothing to do in your consideration of this case, and, as I said, you will confine your considerations of the evidence in this case to the question of damages solely."

6. The court erred in instructing the jury as follows:

"The questions for you to determine are first, whether *the* under the facts shown by the evidence in this case the value of these potatoes was as stated in the invoice, 1,986.75, at the time they were shipped from Bailey Michigan on or about November 3 1917 and second, whether the plaintiff exercised diligence and reasonable care in disposing of this car of potatoes and obtaining therefor the largest price possible under the circumstances, taking into consideration the facts disclosed by the evidence in this case third, as to whether or not the items of expense claimed in disposing of this case—that is, its contents, are reasonable and just. I instruct you that the duty rested upon the plaintiff to obtain the highest price possible under the circumstances and to exercise reasonable care and diligence to that end. So that the damages accruing against the defendant might be reduced to the minimum. Each of these questions are questions of fact for your determination under the evidence.

The burden of proof rests upon the plaintiff to show, first, the value of these potatoes at the time of shipment, and in this connection you may consider the invoice price fixed at the time of shipment and the other facts and circumstances in the case which you find to be true; second what was actually done by the plaintiff in disposing of this car and its contents, whether due care was used by the plaintiff to minimize the defendant's damages as much as possible;  
157 and third, as to whether or not the items of expense claimed to have been paid out are reasonable and just to be charged up against this defendant. I have given you the various items constituting the plaintiff's claim in these particulars. You will re-

under these items not alone from the instructions given you by the court, but from the evidence in this case.

If you find for the plaintiff, you will determine the value of these potatoes at the time of shipment under the evidence and deduct therefrom the reasonable costs and charges—no, just strike that out. You will ascertain the value of these potatoes at the time of shipment, giving the defendant credit for the proceeds of the car less the reasonable expense of disposing of the car and its contents and render a verdict for the plaintiff for the balance, together with interest at the rate of five per cent."

7. The court erred in overruling defendant's objection to testimony on the question of damages arising at Memphis, Tennessee, the said testimony being incompetent against the defendant Pere Marquette Railway Company as not arising out of the contract of shipment under which the car in question moved from Bailey, Michigan, to Louisville, Kentucky.

8. The court erred in overruling defendant's objection to testimony covering facts occurring subsequent to the delivery of the car in question at Louisville Kentucky.

9. The court erred in overruling the objection of defendant's counsel to testimony of Peter Witkop as to what happened at Dumesnil, Kentucky, after the delivery of the car in question by the Big Four Railroad Company.

10. The court erred in admitting proof as to damages shown to have occurred at Memphis, Tennessee.

11. The court erred in overruling the objection of defendant's counsel to testimony as to the movement of the car from Louisville to Dumesnil and from Dumesnil to Memphis, the same having occurred after delivery of the car by the Big Four Railroad Company and after the discharge of the Pere Marquette as initial carrier under the bill of lading.

12. The court erred in refusing to admit in evidence the statement of counsel for plaintiff made to the court in the absence of the jury, the same being offered by defendant as a declaration against interest.

13. The court erred in refusing to admit in evidence letter of plaintiff's attorneys dated January 2, 1918, and addressed to the Freight Claim Agent of the Pere Marquette Railway Company, the same being offered by defendant as a declaration against interest.

14. The court erred in excluding from the reading of the deposition of Colonel S. B. Pearson the following question put to him by the attorney for plaintiff at the time of taking his deposition:

"Q. I will state what we claim to be the facts in this case. Marshall & Kelsey purchased 40 cars of potatoes from H. Moseley of Grand Rapids Michigan, cars to be loaded to capacity preferably and

1,000 bushels to the car, sale price to be \$2.63 per hundredweight less freight rate from Michigan to Indianapolis, Indiana, cars to be shipped on order bill of lading to the order of the shipper, destination Louisville, Kentucky, notifying Marshall & Kelsey, care of the Quartermaster Camp Zachary Taylor, draft for the purchase price to be drawn on Marshall & Kelsey and attached to the original order bill of lading and forwarded to Commercial National Bank of Indianapolis, Indiana. Cars were so shipped with the exception of the Conger cars, which were billed directly to Dumesnil on later instructions. The order bill of lading with draft attached was deposited by French & Co. and Reed & Cheney Co. in their respective banks at Grand Rapids, and they received full credit as a deposit for the amount of the draft on the cars. Conger's draft with the

159 order bills were mailed directly and by him to the Commercial National Bank, upon receipt of these bills of lading with the drafts attached by the Commercial National Bank it detached the bills of lading from the drafts and delivered them to Marshall & Kelsey without requiring the payment of the drafts or any money thereon, and Kelsey brought the bills of lading to Camp Taylor and delivered them to the agent of the Southern Railway Co. at this camp. The terminal railroads at Louisville changed the billing on the cars billed to Louisville by scratching out Louisville and writing on the billing the words 'Camp Taylor.' Did you know any of those facts?"

NORRIS, McPHERSON, HARRINGTON & WAER,

*Attorneys for Defendant.*

PARKER, SHIELDS & BROWN,

*Of Counsel.*

(Here follow bills of lading marked pages 160 and 161.)

Agents No.

Nov. 2nd 1917

17

from J. T. French & Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

IF Special	IF Special	is in Cents per 100 Lbs.
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Per.....	Per.....
Per.....	Per.....

etc. Bill of Lading is to be signed by the shipper and agent of the carrier (using same.)



## Pere Marquette Railway Company

Shippers No. \_\_\_\_\_

## ORDER BILL OF LADING—ORIGINAL.

Agents No. \_\_\_\_\_

RECEIVED, subject to the classifications and tariffs in effect on the date of issue of this Original Bill of Lading.

at Grand Rapids, Mich. Dec. 7, 1917,

from J. F. French & Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said Company agrees to carry to its usual place of delivery at said destination, if in its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns.

The surrender of this Original ORDER Bill of Lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper.

The Rate of Freight from \_\_\_\_\_

to \_\_\_\_\_ is in Cents per 100 Lbs.

IF 1st Class	IF 2d Class	IF Rule 25	IF 3d Class	IF Rule 26	IF Rule 28	IF 4th Class	IF 5th Class	IF 6th Class	IF Special per	IF Special per

(Mail Address—Not for purposes of Delivery.)

Consigned to ORDER OF J. F. French & Co.Destination, Memphis State of Tenn. County of \_\_\_\_\_Notify McKnight & HillAt Do. State of \_\_\_\_\_ County of \_\_\_\_\_Route, \_\_\_\_\_ Car Initial N.Y.C. Car No. 151473

NO. PACKAGES	DESCRIPTION OF ARTICLES AND SPECIAL MARKS	WEIGHT (Subject to Correction)	CLASS OR RATE	CHECK COLUMN	If charges are to be prepaid, write or stamp here, "To be Prepaid."
300	Sax Potatoes	4500.0			
	Allow inspection	Reconsignment accomplished			Received \$ _____ to apply in prepayment of the charges on the property described hereon.
	All charges including car services guaranteed				
	This bill of lading is for bill of lading No. _____ Mich. on the 3rd day of Nov. by the P.M.Ry. Company.				Per _____ (The signature here acknowledges only the amount prepaid.)
					Agent or Cashier.
					Charges Advanced: \$ _____

J. F. French &amp; Co. Shipper Fred M. Briggs, D.F.A. Agent

Per \_\_\_\_\_ T

(This Bill of Lading is to be signed by the shipper and agent of the carrier issuing same.)





162 At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the fifteenth day of October in the year of our Lord one thousand nine hundred and eighteen.

Present: The Honorable

Russel C. Ostrander,  
*Chief Justice.*

John E. Bird,

Joseph B. Moore,

Joseph H. Steere,

Flavius L. Brooke,

Grant Fellows,

John W. Stone,

Franz C. Kuhn,

*Associate Justices.*

No. 28489.

J. F. FRENCH & COMPANY

VS.

PERE MARQUETTE RAILWAY COMPANY.

This cause coming on to be heard is argued by Mr. Hall for the plaintiff and by Mr. Waer for the defendant and duly submitted.

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*Opinion.*

Supreme Court.

J. F. FRENCH & COMPANY, Composed of J. F. French and John Wallace, Plaintiff-Appellee,

VS.

PERE MARQUETTE RAILWAY COMPANY, Defendant-Appellant.

Before the Full Bench.

STEERE, J.:

This action was brought against defendant as initial carrier to recover damages sustained by plaintiff on a carload of potatoes shipped from Bailey, Michigan, on November 3, 1917, over defendant's line and connecting carrier, to Louisville, Kentucky. The potatoes were intended for ultimate delivery at Camp Zachary Taylor, located near Louisville on the Southern Railroad. After this camp was established the Southern road opened a station at that point, called Dumesnil, to handle the freight business which the camp demanded and developed. A firm named Marshall & Kelsey, of Indianapolis, Indiana, had secured from the quartermasters of

the camp a contract to supply it with a quantity of potatoes, and sub-let a contract to a produce broker of Grand Rapids named Mosely to supply 40 carloads, of which plaintiffs, who were produce dealers and handled potatoes furnished a part, the car in question being one of several which they shipped in that connection. The price of the potatoes to plaintiff was \$2.63 per cwt. less freight rate from Bailey to Indianapolis. The bill of lading, issued by defendant, shows it was N. Y. C. Car No. 141,473, containing 300 sacks of potatoes weighing 45,000 pounds, billed from Bailey, Mich.—destination Louisville, Kentucky, consigned to the order of J. F. French & Co.—route C. C. C. and St. L., often called the "Big Four." Upon the bill is the direction, "Notify Marshall & Kelsey, C/ Captain Bernard, Commissary at Camp Zachary Taylor," and "Allow inspection."

164 The car was moved under a standard uniform bill of lading, and a billing of like import accompanied the car showing routing, destination, consignee, etc. Defendant was the initial carrier and the Big Four Railroad was both the connecting and terminal carrier. No claim of negligence is made as to time or manner of transporting the car over its route from point of shipment to Louisville, its destination and contracted point of delivery. Plaintiff's grievance, and claimed ground of negligence which resulted in the damages sought to be recovered, is a re-consignment of the car by the terminal carrier at Louisville for further movement over another line, without authority of the assignee at the destination point or requiring surrender of the original bill of lading for cancellation.

The trial court held that as a matter of law under the undisputed evidence the terminal carrier was guilty of negligence in that particular and defendant liable for resulting damages, if any; and submitted to the jury the question of damages with proper instructions upon that issue. As to burden of proof, measure of damages if any were shown, etc. Plaintiff recovered verdict with judgment thereon for \$689.20.

Defendant's counsel properly saved adverse rulings desired reviewed by seasonable objections, motions, request for directed verdict, etc. and concisely point out in their brief that they center to a "narrow and well defined" issue, saying: "There is involved simply a construction of the Federal Uniform Bills of Lading Act passed in 1916 (39 Stat. at Large, p. 538-542) in connection with the so-called Carmack Amendment."

When the car was loaded and started from Bailey, its point of shipment, plaintiffs received from defendant, its initial carrier, the original order bill of lading covering this car, of the standard form approved by the Inter-State Commerce Commission, to which they attached a draft for the selling price drawn on Marshall & Kelsey of Indianapolis and turned it over to their local bank at Grand

Rapids, receiving credit therefor on their commercial account  
165 and the bank forwarded the bill of lading with draft attached to the Commercial National Bank of Indianapolis for collection. As it turned out, the Indianapolis bank in careless disregard of its duty as a collecting agent handled the shipping bill in a way

which made possible the complications which followed. Instead of requiring payment of the draft before surrendering the shipping bill to the payor, it detached the bill from the draft and entrusted it to Kelsey, who took it with other bills to Demisnil and, on about November 1 or 15, left it at the Southern Railroad station with one of its employees named Bindner who worked in the station of cashier. The agent of the Southern road at Demisnil, named Baker, testified that he never had the bill of lading for that car and could not say that it was in the office, but the cashier had the same authority as he to deliver shipments. Bindner testified that he was not holding those bills for the Southern Railroad Company, but they were given to him by Kelsey, who had a whole lot of stuff in his pocket to keep for him, and he (Bindner) "chucked them in a drawer" and was holding them for Kelsey. The car arrived at Louisville on November 9 and remained at the Big Four station until November 16 when Bindner called up by 'phone the trackage clerk of the Big Four at Louisville, named Smith, told him he had the bill of lading and to let the car go out to the camp. Bindner testified that he did not do this under Kelsey's directions or as agent for the Southern Railway but on his own hook because the car was overdue, he had looked at the routing which was over the Big Four and he knew the government needed potatoes. Smith testified that on receiving this word from Bindner he told him if the Southern Railway would guarantee him "our car service" and he had the bill of lading, he would send it out and, although he knew that under the rules of the Big Four he should not let the car go without surrender of the bill of lading he took the chance and recognized the car by changing the destination in the way bill with charges to follow and 1651<sub>2</sub> sent it forward over the Southern Ry. Line, which received and moved it under the altered way bill marked "Dumesnil, Kentucky So. R. R.," delivering it at its destination on November 18, charging a six cent local rate for the haul from Louisville to Dumesnil.

This car arrived at Louisville over the Big Four Line on the evening of November 9, 1917. Kelsey had told Smith that he was stopping in that city at the Watterson hotel and asked to be notified by 'phone when cars, which he expected, arrived for his firm and Smith on the next day (November 10) first attempted to get him by 'phone, but being unsuccessful sent a regular form postal card notice by mail, addressed to the firm, care of the Watterson hotel, with a 5-day return mark on it, containing full information relative to the car and stamped across its face in large letters "Present Bill of Lading." Smith testified it was the rule of the company that a car billed as this one was should not be delivered without surrender of the bill of lading.

When the car arrived at Dumesnil it was placed on the side tracks near the commissary buildings and, as was shown against plaintiff's objection, was subsequently rejected with numerous other cars on inspection by the quartermaster officers, on what date does not appear, on the ground that the potatoes were suffering from "field frost."

as diagnosed by Captain Hanson, while Col. Pearson stated that when his attention was called to them they were badly frost-bitten and rotten, and he directed Hanson to reject the cars from which they were taken; that as he recollected it the weather was extremely cold at that time and he could not tell whether they were frosted en route or in the field.

Bindner gave the original bill of lading back to Kelsey who returned it to the Indianapolis bank which reattached the draft to it, and returned it to plaintiff's attorney who delivered it to them on December 7. Plaintiff's first notification of rejection of the car was by telegram Bindner sent to Mosely at Grand Rapids, 166 Mich., on December 4, telling him car in question and certain others had been rejected, and Mosely informed plaintiffs of it on December 5. The original bill of lading was then in possession of the Indianapolis bank with the draft. After the original order and draft were returned to plaintiffs they gave the Grand Rapids bank a check for the amount of the draft and surrendered the original order to defendant's Division Freight Agent in exchange for a bill of lading re-consigning the car — the plaintiffs, at Memphis, Tenn., where the goods could be and were disposed of, to the best advantage as is claimed, but at a loss, for recovery of which this action was brought.

Plaintiff's contract was with Marshall & Kelsey, of Indianapolis to whom they sold this carload of potatoes to be delivered at Louisville, Ky. with right of inspection at point of delivery. The right of the purchaser to examine the goods while in the hands of the carrier before accepting them was at the point of delivery only. There is nothing in the acts relied upon which restricts or affects the right of any of the parties connected with the transaction as the law upon that subject previously stood. The law relative to the effect of a "notify" clause in the bill of lading as heretofore settled in this jurisdiction and many others is well digested with numerous citations as follows, in 10 C. J. 259:

"Where a bill of lading or a shipping receipt contains a clause providing that a third person shall be notified of the arrival of the goods, or where it contains this clause and an additional clause reciting that the goods are shipped to the consignor's order, the carrier is not authorized to treat the person to be notified as a consignee, and if it delivers the goods to him without production and surrender of the receipt or the bill of lading, it will be liable to the true owner of the goods for any loss resulting from such delivery."

This court has spoken definitely to that effect and emphasized the significance of a provision in the order bill of lading that in surrender properly endorsed shall be required before delivery of the consignment. *Perkett v. Manistee, etc., R. Co.*, 175 Mich. 254; *Turnbull v. Mich. Cent. R. R.*, 183 Mich. 213; *Thomas v. Blair*, 185 Mich. 429; *Churchill v. G. J. Western Ry.*, 188 Mich. 167 376.

It is defendant's contention that these decisions are largely emasculated in their general import and become wholly inapplicable

here by reason of the negotiable characteristics given a bill of lading by the act of congress passed August 29, 1916, to take effect January 2, 1917, entitled "An Act relating to bills of lading in inter-state and foreign commerce," (U. S. Stat. at Large, vol. 39, part 1, p. 538), construed in connection with the Carmack amendment of the inter-state commerce act under which this action was brought. Counsel's position is pointedly stated in part as follows:

"The rules of ordinary contract law have absolutely nothing to do with this case because this case involves a negotiable instrument and not a contract of the common law. \* \* \* Mr. Bindner, while he had possession of the bill of lading, exercised the authority which as mere possession conferred and obtained the car from the Big Four. Bindner by virtue of his possession (not ownership) of the bill of lading, was a person to whom the Big Four, the delivering and terminal carrier, was justified in making delivery of this car. The Big Four did not make delivery of the car to Bindner while he was in possession of the bill of lading, and thereby did what it was authorized to do by section 9 of the Bills of Lading Act."

That act, containing 45 sections, is in its nature related to and supplemental of the inter-state commerce law which, as enacted in 1887 underwent various amendments by the Act of June 29, 1906, (34 Stat. at Large p. 884, chap. 3591), especially as to section 20 relative to carrier's liability, commonly called the Carmack amendment, which made the initial carrier in inter-state transportation liable for through carriage to point of destination under the bills of lading required to be issued therefor. The material concluding portion of that lengthy amendment of section 20 (of the 1887 act—see 7 of the 1906 act) is as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company, to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

168 See, 9 of the act of 1916 relating to bills of lading, upon subdivision (c) of which defendant relies, is as follows:

"Sec. 9. That a carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

- (a) A person lawfully entitled to the possession of the goods, or
- (b) The consignee named in a straight bill of lading, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the medium or immediate endorsee of the consignee."

The section immediately preceding (8) and three sections following (10-11-12) also relate to delivery, and so far as material are as follows:

"Sec. 8. \* \* \* a carrier, in the absence of some lawful excuse, is bound to deliver goods upon demand made either by the consignee named in the bill for the goods, or if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure."

(Sec. 9.) \* \* \*

(Sec. 10.) \* \* \* where a carrier delivers goods to the one who is not lawfully entitled to possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods." \* \* \*

"Sec. 11. \* \* \* if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone, who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto." \* \* \*

"Sec. 12. \* \* \* if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description, \* \* \* he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether  
160 such purchaser acquired title before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made by the person entitled thereto."

These are Federal laws, for controlling interpretation by the Federal courts in their final analysis, and the State courts when called upon to deal with them are governed by the construction declared in decisions of those courts, where they have spoken. Counsel do not cite and we have not found any adjudication directly construing the provisions of the statute upon which defendant relies. The scope and purpose of the Carmack amendment, of which the later act is but supplemental, has frequently been before the U. S. Supreme Court for consideration of its various provisions. Its manifest purpose is as interpreted by that court, to create in the initial carrier unity of responsibility for transportation to destination and bring contracts for inter-state shipments under one uniform law, to which end a proper receipt, or bill of lading, must issue therefor.

"The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as is valid under the act." *Kansas South. Ry. v. Carl*, 327 U. S. 640.

In *Adams Express Co. v. Croninger*, 226 U. S. 491, holding that a contract in a bill of lading relative to rates was not in violation of the act, the court said:

"The statutory liability, aside from responsibility for the default of the connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as many courts of the States."

In view of the history of the inter-state commerce law, its administration and the many decisions of both Federal and State courts recognizing certain of its features as but declaratory of common law principles, it is wide of the mark to assume that because enacted into statute the rules of the common law have nothing to do with this inquiry. This order bill of lading under which the shipment was made while now negotiable under the act of 1916, possessed those attributes in like degree and had often been recognized as such by the courts years before the act was passed. That act, which counsel in their briefs designate the "Uniform Bills of Lading Act," nowhere in express language, either in its title or body, prescribes a form for or even mentions a uniform bill of lading. As "An  
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act relating to bills of lading in inter-state and foreign commerce," its subject-matter is suggestive of the name and instructive of its purpose in the particular that many of its provisions and requirements harmonize with and follow in general plan the standard uniform bills of lading which the Interstate Commerce Commission had approved as such and which, by years of use, had become familiar to commerce. Those forms, after careful consideration in the light of experience, had been approved by the Commission and adopted by shippers and carriers, without direct legislation therefor, to meet the general requirements of the Carmack amendment. In practical application as the law was administered by the Commission and interpreted by the courts they had through years of trial and test apparently proved satisfactory and efficient for conduct of the gigantic and complicated business of inter-state and foreign transportation. It is fairly inferable that the intent of this act was to strengthen by legislative endorsement that which had for efficient administration of the inter-state commerce law been worked out, adopted and approved by the combined efforts of shippers, carriers and the Interstate Commerce Commission.

If it was the purpose of the act to impose limitations on these long used and often construed bills of lading to an extent which changed the settled law in the important particular claimed, it would seem that, in the absence of a prescribed form and in view of the context, a clearer declaration than that relied on would be found somewhere in the act.

The form of order bill of lading used by defendant in this case and delivered to plaintiffs, stating in bold type on its face that its surrender properly endorsed "shall be required before the delivery of the property," is the prescribed form set out at length in connection with the opinion and order of approval thereof filed by the Interstate

Commerce Commission after full hearing, on June 27, 1908. 171 (14 Interstate Commerce Commission Rep. 346). Two forms are there recognized, as also in this act. An order bill of lading though negotiable represents property, not money, and the certainty of its surrender before delivery of the property it describes is a matter of serious significance in financing consignments for transportation, as pointed out by Judge Knapp, Chairman of the Commission, in the portion of the opinion discussing the two approved forms of bills of lading, as follows:

"The main point in this connection is that the 'order' bill will possess a certain degree of negotiability, while the 'straight' bill will be nonnegotiable and is to be so stamped upon its face. Moreover, and this is a matter of consequence, the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee. It is believed that this plan will in large part meet the requirements of the banking concerns of the country which advance vast sums of money upon bills of lading and are entitled to a reasonable measure of protection.

Sec. 8 of the act under consideration affords the carrier full protection by refusing delivery of the property when demanded by the consignee or holder of an order bill of lading, unless possession of the same properly endorsed thereon is surrendered.



Sec. 43 of the act specifies that "unless the context of the subject-matter otherwise requires, \* \* \* 'Holder' of a bill means a person who has both actual possession of such bill and a right of property therein." That definition clearly did not fit Bindner who had no right of property nor interest in the bill, nor control of it or right of possession beyond its safe keeping for Kelsey, which accommodation trust he executed by "chucking" it with other papers into a drawer and handing it back when called for, in the meantime, however, on his "own hook" without instructions from anyone telling Smith, who neither saw nor asked for the order, that he had it, with the results before detailed. But, eliminating him as a "holder" under the strict statutory definition, it may be conceded that nevertheless, under subdivision (c) of Sec. 9 he was entitled to delivery of the shipment as a person in possession of the order bill endorsed in blank by the consignee. Defendant in fact did not deliver the goods 172 direct to him but turned them over by an irregular reconsignment to another carrier on the strength of his statement that he had the bill, without asking for it or even seeing it, in admitted violation of its own rules and of the distinct provision on the face of the order bill under which it had received the consignment, that its surrender should be required before delivery. By statute the carrier is made liable for the acts of its agents. The act nowhere prescribes the form of shipping bill which should be used nor in express language forbids that used here, and generally. Resorting to context to determine the intent of subdivision (c) of sec. 9 in the connection used, especially importance is given to surrender of the order for cancellation on delivery, for protection of the carrier, both in preceding and following provisions, read in connection with which it may be fairly inferred, taking all the related provisions together, that When a person in bare possession of the bill, not shown or known to have any actual interest or right of property therein, demands delivery of the goods the carrier is only justified in complying on surrender of the bill to it; or, at least, as tintured by the context and in view of the general purpose of the act, the provision relied on is not to be construed as prohibitive of a contract requirement in the order bill of lading issued by the carrier to that effect.

Other points raised and discussed have not been overlooked, but regarding the controlling question, as stated by defendant's counsel to be the construction of the act of 1916 in connection with the Carmack amendment, and agreeing with the construction, as applied to the facts in this case, by the trial court, we find no occasion to disturb the judgment, which is therefore affirmed.

(Signed)

J. H. STEERE.  
RUSSELL C. OSTRANDER.  
JNO. E. BIRD.  
JOSEPH B. MOORE.  
FLAVIUS L. BROOKE.  
J. W. STONE.  
FRANZ C. KUHN.  
GRANT FELLOWS.

173 At a Session of the Supreme Court of the State of Michigan, held at the Supreme Court Room, in the Capitol, in the City of Lansing, on the third day of April in the year of our Lord one thousand nine hundred and nineteen.

Present: The Honorable

John E. Birdd,  
*Chief Justice.*  
 Russell C. Ostrander,  
 Joseph B. Moore,  
 Joseph H. Steere,  
 Flavius L. Brooke,  
 Grant Fellows,  
 John W. Stone,  
 Franz C. Kuhn,  
*Associate Justices.*

No. 28489.

J. F. FRENCH AND COMPANY, Composed of J. F. French and John Wallace, Plaintiff,

vs.

PERE MARQUETTE RAILWAY COMPANY, Defendant and Appellant

The record and proceedings in this cause having been removed to this court by Writ of Error, issued to the Circuit Court for the County of Kent, and the same, and the matters in error assigned having been seen and inspected and duly considered by the Court and it appearing to this Court that in said record and proceedings and in the giving of judgment in said Circuit Court there is no error. Therefore it is ordered and adjudged that the judgment of said Circuit Court for the County of Kent be and the same is hereby in all things affirmed, and that the plaintiff do recover of the defendant its costs, to be taxed, and that it have execution therefor.

174 Supreme Court of the State of Michigan.

J. F. FRENCH AND COMPANY, Composed of J. F. French and John Wallace, Plaintiff,

vs.

PERE MARQUETTE RAILWAY COMPANY, Defendant and Appellant

IN THE SUPREME COURT, ss:

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record, and of all the proceedings had and determined in the above entitled cause by said Supreme Court, includ

ing the written decision and reasons therefor, signed by the Judges of said Court and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof; together with a true copy of the judgment entry and the order on hearing.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at the City of Lansing, this eleventh day of April, in the year of our Lord, one thousand nine hundred and nineteen.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,  
*Clerk.*

175 STATE OF MICHIGAN:

The Supreme Court.

No. 28489.

J. F. FRENCH & COMPANY, Composed of Jay F. French and John Wallace, Plaintiff and Appellee,

VS.

PERE MARQUETTE RAILWAY COMPANY, Defendant and Appellant.

*Stipulation as to Return to Writ of Certiorari.*

In the above entitled cause, it is hereby stipulated that the certified transcript of record on file in the office of the Clerk of the Supreme Court of the United States in the matter of Pere Marquette Railway Company, Petitioner, for a Writ of Certiorari against J. F. French & Company, Respondent, and there numbered 1029 of the October Term, 1918, upon the docket of said court, shall stand as a return by this Court to the Writ of Certiorari issued by the Supreme Court of the United States in said cause.

(Signed)

OSCAR E. WAER,  
JOHN C. SHIELDS,  
*Attorneys for Petitioner.*  
NORRIS, McPHERSON, HARRINGTON & WAER,  
*Counsel for Appellant.*  
HALL & GILLARD,  
*Counsel for Appellee.*

Dated: Grand Rapids, Mich., June 12, 1919.

Endorsed: Filed June 14th, 1919. Jay Mertz, Clerk Supreme Court of Michigan.

STATE OF MICHIGAN, ss:

In the Supreme Court.

Clerk's Office.

I, Jay Mertz, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of stipulation filed June 14, 1919, in said Court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Supreme Court, at Lansing, this 20th day of June A. D. 1919.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,  
Clerk.

176 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Michigan, Greeting:

Being informed that there is now pending before you a suit in which Pere Marquette Railway Company is appellant, and J. F. French & Company, composed of Jay F. French and John Wallace, is appellee, No. 28489, which suit was removed into the said Supreme Court by virtue of a writ of error to the Circuit Court for the County of Kent, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court and removed into the Supreme Court of the United States, do hereby command you that you send

177 without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the seventeenth day of June, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,  
Clerk of the Supreme Court of the United States.

178 To the Supreme Court of the United States:

The execution of the within Writ appears by the transcript of the Record heretofore filed in said cause and now on file in the office of the Clerk of the Court, and by a certified copy of a stipulation signed

by the attorneys for the respective parties making said record the return to this Writ, hereto attached.

Lansing, Michigan, June 20th, 1919.

[Seal of the Supreme Court of Michigan, Lansing.]

JAY MERTZ,

*Clerk of the Supreme Court of the State of Michigan.*

[Endorsed:] File No. 27,115. Supreme Court of the United States. No. 1029, October Term, 1918. Pere Marquette Railway Company vs. J. F. French & Company. Writ of Certiorari.

179 [Endorsed:] File No. 27,115. Supreme Court U. S. October Term, 1919. Term No. 369. Pere Marquette Railway Company, Petitioner, vs. J. F. French & Company. Writ of Certiorari and Return. Filed June 23, 1919.



MAY 19 1919

JAMES D. WAHER,  
CLERK

No. 105

# Supreme Court of the United States

OCTOBER TERM, 1918.

PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

vs.

J. F. FRENCH & COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme  
Court of the State of Michigan.

PETITION FOR WRIT OF CERTIORARI,  
BRIEF ON PETITION

and

APPENDIX

Containing Uniform Bills of Lading Act.

OSCAR E. WAER,  
JOHN C. SHIELDS,  
Counsel for Petitioner.





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# **The Supreme Court of the United States.**

OCTOBER TERM, 1918.

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PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

vs.

J. F. FRENCH & COMPANY, Com-  
posed of Jay F. French and John  
Wallace,

Respondent.

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## **PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MICHIGAN.**

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*To the Honorable, the Supreme Court of the  
United States:*

Your Petitioner, Pere Marquette Railway Company, prays for a Writ of Certiorari to review the judgment of the Supreme Court of the State of Michigan in the above entitled case, and respectfully shows unto the Court as follows:

*Question Involved:*

Does the Federal Uniform Bills of Lading Act passed in 1916 (Act of Aug. 29, 1916, Chap. 415; 39 Stats. at Large, 539) protect a carrier in making delivery of an interstate shipment to a person in possession of the order bill of lading endorsed in blank by the consignee, and if delivery is made without requiring a surrender and cancellation of the bill, is the carrier liable on such bill to one not a bona fide holder, viz., the shipper and original consignee, who regains possession of the bill with knowledge that the delivering carrier has already turned the car over to another person in reliance upon such person's possession of the bill?

*Statement of the Case:*

Sections 8, 9, 10 and 11 of the Uniform Bills of Lading Act read in part as follows (The whole act is printed as an appendix to the brief in support of the petition):

"Sec. 8.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such demand is accompanied by—

(b) Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods, if the bill is an order bill."

"Sec. 9.—A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him,

or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

"Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

"Sec. 11.—Except as provided in Section 26, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

In November, 1917, respondent (hereinafter referred to as the "shipper") shipped a carload of potatoes from Bailey, Michigan, to Louisville, Kentucky, over the Pere Marquette Railway Company, the petitioner, as initial

carrier, and the Big Four Railroad as connecting and terminal carrier, the Pere Marquette being sued as initial carrier under the Carmack Amendment. The car was one of some forty other cars of potatoes shipped as part of the same deal and sold to the firm of Marshall & Kelsey of Indianapolis, Indiana (R. 8), which firm had in turn made a contract for a sale of the potatoes to the quartermaster at Camp Zachary Taylor, a government cantonment located just outside of the City of Louisville (R. 8). The Big Four runs into the City of Louisville proper, but its line does not run out to the camp (R. 8). Freight destined to the camp is carried from the City of Louisville to the camp by the Southern Railroad, which has a station at the camp called Dumesnil (R. 8).

The shipper obtained from the Pere Marquette the usual negotiable order bill of lading in which the car was consigned to the order of the shipper at Louisville, Kentucky, and which bore the notation, "Notify Marshall & Kelsey, c/o Captain Bernard, Commissary, Camp Zachary Taylor" (R. 8). The bill of lading, in common with all order bills of lading in use at the time and for a long time prior to the passage of the Uniform Bills of Lading Act, contained on its face a clause reading, "The surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property".

The shipper endorsed the negotiable order bill of lading in blank, drew a draft on Marshall & Kelsey, and deposited both draft and endorsed bill of lading with its bank in Grand Rapids, Michigan, for collection, and the bank forwarded them to the Commercial National Bank of Indianapolis, Indiana, for the same purpose (R. 8, 9).

The Indianapolis bank, without requiring payment of the draft, turned the bill of lading endorsed in blank over

to Mr. Kelsey, of the firm of Marshall & Kelsey, the notify party named therein (R. 9, 10).

Mr. Kelsey took the bill of lading endorsed in blank to Camp Taylor and turned it over to one James Bindner, the cashier, and one of the men in charge, of the Southern Railroad station at the camp (R. 10). Bindner had the bill of lading in his possession when the car which it covered arrived at its destination in Louisville (R. 70), and upon learning of its arrival through a telephone inquiry, asked the Big Four to send the car out to Camp Taylor (R. 89). The Big Four, upon receiving Bindner's request and upon his assurance that he had the bill of lading, delivered the car to the Southern Railroad for transportation to the camp (R. 90).

The agent of the Big Four who made delivery of the car to the Southern Railroad did not know, and neither Bindner nor anyone else told him, that there was anything unusual about the bill of lading (R. 74, 79, 90). He had no knowledge that the draft covering the car had not been paid, and knew nothing about the circumstances under which the bill of lading came into Bindner's hands. He knew that Bindner had the bill of lading endorsed in blank in his possession (R. 73). He had received this information both from Bindner (R. 90) and from Mr. Kelsey (R. 95), the latter having come to the office of the Big Four a day or two before the car had arrived, and having told the agent of the Big Four that the bill of lading was surrendered to the Southern Railway office at Dumesnil (R. 95).

The Southern took the car out to the camp where it arrived November 18th (R. 74). At about the same time the shipper learned from Marshall & Kelsey that the government had rejected other cars shipped by him, because the potatoes were suffering from field frost, and sent an agent to Louisville and Dumesnil to investigate

(R. 10). Shipper's agent found the car in suit at Dumesnil and learned also that the bill of lading was in the hands of Bindner (R. 10, 11). Shipper's agent stayed at Dumesnil until November 30th handling and sorting other cars, part of which the government accepted (R. 10). The car in suit was not sorted and was finally refused by the government on November 28th (R. 11). Thereafter and on December 2nd, shipper sent his attorney to the Indianapolis bank to demand payment of the draft, which was refused (R. 11). The bank admitted that it had turned the bill of lading over to Mr. Kelsey without requiring payment of the draft (R. 11). On December 3rd, however, Mr. Kelsey went to Mr. Bindner at Dumesnil and succeeded in getting back the bill of lading which Bindner had had in his possession during all of this time, took it back to the bank, which in turn tendered it back to the shipper's attorney when he returned to the bank on December 4th (R. 12). Mr. Bindner explains his action in returning the bill to Kelsey by saying that he held it for him all the time as his agent and therefore returned it to him at his request (R. 75, 77). The shipper's attorney asked the bank for further time to consider, and after making a further investigation at Louisville, came back to the bank, and with knowledge of all the foregoing facts, and of all that had occurred (R. 9-12) accepted the return of the bill from the bank under protest; and the shipper, in order as he says, to handle the potatoes and save them from a total loss, took possession of them, reshipped them to Memphis, Tennessee, and sold them at a loss over the invoice price to Marshall & Kelsey, which loss he seeks to recover in this case (R. 12, 13).

The shipper claims no negligence in the transportation of the car from point of origin to Louisville, and makes no claim that any damage resulted through the reship-



ment of the potatoes from Dumesnil to Memphis, Tennessee ( R. 28, 30, 41 ). The shipper's sole claim was, and the trial court charged the jury that the act of the terminal carrier in turning the car over to the Southern Railroad without requiring a surrender and cancellation of the bill constituted a conversion of the car and made the carrier liable for its value less the amount realized on it when the shipper finally sold it ( R. 49, 50, 139, 145 ). The Supreme Court of Michigan affirmed the case ( R. 163-176—Opinion of Court ).

The petitioner's claim is, that the facts in this case bring it squarely within the plain and unambiguous terms of the Uniform Bills of Lading Act above referred to, in that the terminal carrier,—

(a) Delivered the car to a person in possession of an order bill for the goods endorsed in blank by the consignee by delivering it to the Southern R. R. at the request of Bindner who had the bill in his possession, and in that—

(b) Its failure to take up and cancel the bill made it liable only to one who in good faith and for value might acquire such bill, and did not make it liable to the shipper in this case, who took back the bill with knowledge of all the facts after it had been used to effect a delivery of the car, and who was in no way damaged by the failure to take up and cancel the bill.

#### *Reasons for the Allowance of the Writ.*

1. The decision of the Michigan Court nullifies the Federal Uniform Bills of Lading Act, by holding that its plain terms do not apply to the bill of lading involved in this case. The bill of lading involved in this case is the only negotiable form in use prior, as well as subsequent,

to the passage of the Act, and if the act does not apply to this bill of lading, it applies to no interstate bill of lading.

2. The question involved is one of general application to all interstate bills of lading, and the applicable provisions of the statute of 1916 never having been passed upon by the Federal Court, it is important from the standpoint of shippers, as well as carriers, that the issue here involved be passed upon and finally determined by this Court.

3. The decision of the Supreme Court of Michigan in effect destroys the negotiability of bills of lading so that such instruments are no longer transferable by endorsement and delivery.

4. The Supreme Court of Michigan erred in its conclusion that the contention of petitioner in this case is contrary to its earlier decisions, and that such decisions are controlling in this case. There is no conflict between the plain terms of the Uniform Bills of Lading Act and the Michigan decisions referred to, because none of the decisions involved the question here involved—in none of them did the carrier turn over or deliver the shipment to a person *in possession of the bill of lading endorsed in blank*. In all of them delivery was made to a person *not in possession* and who never had possession of the bill of lading, the bill of lading never having left the bank and never having been used by anyone to obtain a delivery of the shipment.

5. This case involves but one car of potatoes, but the transaction out of which it arises involves twelve other cars, over which other suits are pending and in which this same question is in issue.

Wherefore, your petitioner, the Pere Marquette Railway Company, prays that a Writ of Certiorari issue out

of and under the seal of this Honorable Court, directed to the Supreme Court of Michigan, commanding the said court to certify to this Honorable Court, on a day certain to be therein designated, a full and complete transcript of the record of proceedings of said Supreme Court in said case, there entitled J. F. French & Company, composed of Jay F. French and John Wallace, Plaintiff and Appellee, vs. Pere Marquette Railway Company, Defendant and Appellant, to the end that the said cause may be reviewed and determined by this Honorable Court; that said petitioner may have such other and further relief in the premises as to this Court may seem proper and as the nature and circumstances of the case may require; and that said judgment and decree of the Supreme Court of Michigan in said cause be reversed by this Honorable Court.

And your petitioner will ever pray

Oscar E. Warr  
John C. Shields  
Counsel for Petitioner.



## BRIEF IN SUPPORT OF PETITION.

The petitioner claims that under the Uniform Bills of Lading Act, the terminal carrier at Louisville was justified in delivering the car to a person in possession of the bill of lading endorsed in blank, and that the failure of the terminal carrier to take up and cancel the bill imposed upon it no liability except to a purchaser in good faith and for value.

### *Was Bindner a Person in Possession of the Bill?*

The Supreme Court of Michigan states in its opinion that under subdivision (c) of Section 9, Bindner was entitled to a delivery of the shipment as a person in possession of the order bill endorsed in blank by the consignee (R. 175). That he was entitled to such delivery cannot be seriously questioned. The claim made by Bindner that he held the bill of lading as agent for Kelsey, if true, cannot affect the merits of this controversy. An order bill of lading endorsed in blank by the consignee is made by the statute a negotiable instrument and passes from hand to hand by delivery. When once endorsed in blank it becomes in effect "payable to bearer", and any person having it in his possession is entitled to a delivery of the car which it covers. The endorsement in blank of an order bill creates a new contract in that thereafter the bearer instead of the original shipper is the party with whom the carrier must deal. (See Sections 3, 7, 27, 28, 30 and 31 of the act in appendix to this brief.)

### *Did the Big Four Deliver the Car to Bindner?*

Bindner was a person in possession of the bill of lading, and the railroad company was therefore justified in delivering the car to him.

Bindner, while in possession of the bill, called the agent of the Big Four on the telephone, assured him that he (Bindner) had the bill of lading, and asked him to send the car out to the camp by turning it over to the Southern Railroad (R. 89). Pursuant to Bindner's request and in reliance upon his possession of the bill, the car was turned over to the Southern (R. 90). The Big Four parted with it, and the Southern got it. Bindner admits that his request was complied with and the car turned over to the Southern, which brought it out to the camp (R. 74). This surely was just as much a legal delivery of the car to Bindner as if the Big Four had placed it on a team track in Louisville at his request.

When the car was turned over to the Southern, there was turned over with it the waybill (directions to train crew) which had accompanied the car from Bailey, Michigan, to Louisville, the agent of the Big Four, on turning over the car and waybill, having stricken out the word "Louisville" under "destination" and written in place thereof the words "Dumesnil, Ky., So. R. R." That is, instead of making out a new waybill, the agent of the Big Four merely changed the one that had already been used and turned it over to the Southern (R. 90). The Southern carried the car out to the camp on this same waybill and charged a local rate of 6 cents per cwt. against the car for the transportation service.

Counsel claimed in the Michigan Supreme Court that this constituted a "reconsignment" instead of a "delivery", because there was a "change in the destination of the car after it arrived at Louisville". If it was a reconsignment, a change of destination—it was a reconsignment and change of destination *at the request of the person in possession of the bill of lading*—Bindner—and therefore a delivery to Binder.

The shipper surely cannot complain about the disposi-

tion made of the car at the request of the person in possession of the bill, if, as the statute expressly provides (presumptively for the convenience of the shipper), an order bill endorsed in blank is negotiable by delivery. The shipper endorsing the bill in blank says to the carrier: "The person in possession of this bill of lading is entitled to the car. You may follow his instructions as to its disposition."

The Big Four had the car in its possession and control when it reached its destination, Louisville. The Big Four parted with its possession and control at Louisville upon the request of Bindner, and upon his assurance that he had the bill of lading (R. 90). When it did so, it "delivered" the car to Bindner from the standpoint both of common sense, common justice and legal terminology, all of which should be synonymous.

As far as the shipper in this case is concerned, the situation surely is no different than if Bindner instead of telephoning had gone to the office of the Big Four, shown the Big Four the bill of lading then in his possession, requested delivery to him, which was made without requiring him to surrender the bill, and had then turned the car over to the Southern and arranged with that road to take it out to the camp. When the Big Four itself turned the car over to the Southern at Bindner's request, and with it the changed waybill which instructed the train crew to take the car to Dumesnil, Bindner was estopped from questioning the delivery to him, and certainly no one else could complain. The Big Four had the right to reconsign, reship, or do anything else with the car at the request of Bindner, who by virtue of his possession of the bill of lading controlled the car after it reached its destination at Louisville, just as much as if he had been the original shipper.

See Section 31 of the Statute, which reads in part as follows:

"Sec. 31.—A person to whom an order bill has been duly negotiated (an order bill after endorsement in blank is duly negotiated by delivery, see Secs. 27, 29) acquires thereby—

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

After endorsing his bill of lading in blank and giving it circulation, the shipper no longer had a contract with the carrier. It was the Grand Rapids bank, and in turn, the Indianapolis bank, then Kelsey and then Bindner who had the contract with the carrier. Bindner, while he had possession of the bill, caused the carrier to deliver the car pursuant to his request, and no one but he could complain of a violation of the terms of the contract the carrier then had with him and with no one else.

#### *Failure to take up and Cancel the Bill.*

When the Big Four delivered the car to Bindner, it did not take up and cancel the bill though the rules of the Big Four to its employees required it, and though there was a printed clause in the bill itself reading: "The surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property".

Section 11 of the Uniform Bills of Lading Act as shown above provides in part that:

"If a carrier fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill."

The Michigan Court, by its decision, nullifies this and the other applicable provisions of the Uniform Bills of



Lading Act, in holding that failure to take up and cancel the bill makes the carrier liable, *not only to a bona fide purchaser of the bill, but to the origin shipper who regains possession of the bill with notice or knowledge that it has already been used to obtain a delivery of the car.* The Michigan Court seems to base its conclusion on a double hypothesis, viz.,

(1) As against the claim of the shipper himself, the act taken as a whole and in the light of previous decisions, cannot be construed to justify a delivery to a person in bare possession of the bill without requiring a surrender of the bill.

(2) The act is not to be construed as "prohibiting a contract requirement" that the surrender of the bill shall be required.

*Does the Act as a whole compel the Carrier to obtain a Surrender of the Bill on Delivery to a Person in Possession of the Bill?*

Under Section 8, a carrier is bound to deliver goods upon a demand made by the "holder" of the bill if the holder offers to *surrender* the bill, holder being defined by Section 42 of the Act as a "person who has both actual possession of such bill and a right of property therein."

Under Section 9, a carrier is justified "subject to the provisions of the three following sections" in delivering the goods to a person in *possession* of the bill endorsed in blank by the consignee.

The "three following sections" are Sections 10, 11 and 12, the last having no application here and the two former reading as follows:

"Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to ... one having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by

either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or—

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

"Sec. 11.—Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to *anyone who for value and in good faith purchases such bill*, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

If these sections, read together and in connection with the statute as a whole, do not mean what they say, that is, that the carrier is justified in making delivery to a person in possession of the bill of lading endorsed in blank by the consignee, and that, if such delivery is made and the carrier fails to take up and cancel the bill, the carrier shall be liable to a purchaser of the bill for value and in good faith, and to no one else, then what do they mean?

*Previous Decisions.*

There are no prior decisions, either state or federal, laying down any such doctrine as the Supreme Court of Michigan enunciates in the case at bar. The Michigan Court lays much stress upon four of its own previous decisions as being decisive of the case at bar, and says that the Federal Uniform Bills of Lading Act could never have been intended so to change the existing law as to make such decisions no longer controlling. The four cases are the following:

Perkett vs. Railway Co., 175 Mich. 253.

Turnbull vs. Railway Co., 183 Mich. 213.

Thomas vs. Blair, 185 Mich. 422.

Churchill vs. Railway Co., 188 Mich. 376.

We have never made, and do not now make, any claim that these decisions are erroneous or that they are in any way "emasculated" by the Uniform Bills of Lading Act. These cases all involved a delivery of the shipment to, or a diversion or change of routing at the request of, a person *not* in possession and who *never had* possession of the bill of lading endorsed in blank by the consignee. In not one of these cases, and in no case cited by the court or by counsel for the shipper, was there a delivery to or at the request of

"A person in possession of an order bill for the goods endorsed in blank by the consignee."

In *Perkett vs. Railway Co.*, 175 Mich. 253, the carrier diverted the shipment at the request of the consignee, who did *not*, however, have in his possession the bill of lading, the bill of lading *never having left the bank*, to which it was sent with the draft for collection, and it *never having been used by any person* who had possession of it to get the car. In the other three Michigan cases, the carrier in each instance delivered the shipment to a

person who did *not* have, and never had had, possession of the bill of lading, the bill *never having left the bank* and never having been in the possession of any person to whom delivery was made *in reliance on such possession*.

No one questions the decisions of the Michigan Court in the four cases cited. They lay down precisely the same rule laid down by Section 10 of the Uniform Bills of Lading Act which provides that:

“Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier *shall be liable* to anyone having a right of property or possession in the goods *if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section.*”

Subdivision (c) of the preceding section is the one providing that a carrier is justified in making delivery to

“A person in possession of an order bill for the goods endorsed in blank by the consignee.”

In the Michigan cases, the carrier delivered the goods to a “person not lawfully entitled to the possession of them” so that the carrier was liable to the shipper because delivery was made “otherwise than as authorized by subdivisions (b) and (c), viz., delivery was made to a *person not in possession* of the bill of lading.

In the case at bar the carrier did deliver the goods as authorized by subdivision (c) of Section 9, viz., delivery was made to a *person in possession* of the bill of lading which was endorsed in blank, so that the carrier complied with the statute in making delivery, and became liable under Sections 9, 10 and 11 *only* to a purchaser for value and in good faith of the uncanceled bill.

The Michigan Court has itself recognized the rule of the statute that failure to require a surrender and cancellation of the bill makes the carrier liable only to a bona fide

holder, by saying in *Turnbull vs. Michigan Central*, one of the four cases cited:

“It is true that *prima facie* the consignee is the owner of the goods shipped, but it is equally true, and the rule is well established, that when there is an order bill of lading outstanding, the carrier delivering the goods, without requiring the presentation of the bill does so at its peril and is liable to the bona fide holder thereof.”

We have found no case in the books, nor has our attention been directed to any by either the Michigan Court or by counsel, in which it has been held that the carrier who makes delivery of the shipment to a person in possession of the bill endorsed in blank is liable to anyone *except* a bona fide holder of the bill.

The only decision we have been able to find involving facts similar to those in the case at bar is that of *Famous Mfg. Co. vs. Railroad*, 166 Iowa, 361, 147 N. W. 754, decided in 1914, which we called to the attention of the Supreme Court of Michigan, but which that court ignores in its opinion. The material facts of that case are identical with the material facts in the case at bar, and the conclusion of the Supreme Court of Iowa on the question involved in this case is in entire accord with what the Uniform Bills of Lading Act now establishes as the law, and in entire accord with our contention in the case at bar. The facts in the Iowa cases were these:

Plaintiff company shipped a power press consigned to the order of itself and bill of lading was issued accordingly. The waybill was endorsed, “Notify C. J. Bugbee”. Plaintiff sent the bill of lading endorsed in blank to a bank with instructions to make settlement with Bugbee for the purchase price before giving up the bill of lading. The press arrived at destination. The bank called the railroad office by telephone, advised the agent that it had

the bill of lading, and directed him to deliver the shipment to Bugbee. The shipment was delivered to Bugbee. No surrender of the bill of lading was required. Bugbee later returned the press to the railroad company and refused to pay for it. The shipper sued the railroad company. The shipper claimed that the bank had no authority to direct a delivery of the property to Bugbee; that the railroad company was bound to ascertain the extent of the bank's authority; and that the railroad's delivery of the property to Bugbee without an actual surrender of the bill of lading was unauthorized and rendered it liable for conversion of the goods.

The Supreme Court of Iowa held:

(1) That by delivering to the bank the bill of lading duly endorsed, the shipper clothed the bank with the apparent legal title to the property and with the undoubted right to obtain delivery from the railroad company; and that

(2) The delivery to Bugbee, at the direction of the bank, was, in legal effect, a delivery to the bank—not a delivery to Bugbee, the notify party; and that

(3) The fact that the railroad company failed to require a surrender of the bill of lading cast upon it only "the burden of proving that the person to whom or upon whose direction it delivered the property was in fact the holder of the bill of lading at such time."

The shipper in the case at bar shipped the car of potatoes to itself as consignee, and a bill of lading was issued accordingly. The shipper turned the bill duly endorsed in blank over to the Grand Rapids bank, which forwarded it to the Indianapolis bank for collection. The Indianapolis bank turned the bill of lading over to Kelsey without requiring payment of the draft, and he turned it over to Bindner. The car arrived at destination. Bindner called the Big Four by telephone, advised its agent that he had the bill of lading, and directed him to deliver the car to the Southern. The car was delivered to the

Southern. The surrender of the bill of lading was not required. The shipper claims that Bindner had no authority to direct a delivery to the Southern Railroad, that the Big Four was bound to ascertain the extent of Bindner's authority, and that the Big Four's delivery of the car without an actual surrender of the bill of lading was unauthorized and rendered it liable for conversion of the car.

The material facts in the two cases are identical. The claims of the respective shippers are identical. The holdings should be identical, even in the absence of the Uniform Bills of Lading Act. But that act, in the absence or in the face of any decision or decisions, lays down the rights and liabilities of the parties to this suit in language so clear and so simple that "he who runs may read."

*Does the Act Prohibit a Contract Requirement that the Surrender of the Bill shall be required before Delivery of the Shipment, and if not, what is the result of a Breach of such Requirement?*

The order bill of lading used in this transaction is the usual form which had been approved by the Interstate Commerce Commission in 1908 and which was in universal use at the time the Uniform Bills of Lading Act was passed in 1916. That is, order bills of lading prior to the passage of the act, as well as since, have had printed on their face the clause, "the surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property".

If the Uniform Bills of Lading Act does not apply to and does not govern order bills of lading containing *such a clause*, it applies to and governs nothing. It either governs such bills of lading or it governs no order bills of lading at all, because there were and are no other order bills of lading in use.

Let us assume, however, as did the Michigan Court,

that the Uniform Bills of Lading Act is not "to be construed as prohibitive of a contract requirement in the order bill of lading issued by the carrier to that effect", so that Section 11 limiting liability in case of failure to take up and cancel a bill to a bona fide holder does not apply to this case. Does it follow that the carrier then becomes liable? The Supreme Court of Michigan, without pointing out how or why the carrier becomes liable, assumed that it was and rendered judgment against petitioner (R. 176).

For the damage, if any, resulting from the failure to take up and cancel the bill, the carrier can be liable only to the person damaged, and this follows whether the wrong is in violation of the contract created by the bill of lading or in violation of the Uniform Bills of Lading Act.

As previously shown, the terminal carrier made a lawful delivery of the car because it made delivery to a person in possession of the bill of lading endorsed in blank by the consignee—it made delivery to a person clothed by the shipper himself with authority to receive the shipment, the endorsement in blank making the instrument in effect payable to bearer. The failure to take up and cancel the bill was therefore the carrier's only breach of duty or of contract, but this breach of duty or of contract resulted in no damage to the shipper or to anyone else.

All of the damage sustained by the shipper in this case arose through the wrongful act of the Indianapolis bank in turning the bill over to Mr. Kelsey without requiring payment of the draft. Through and as a direct consequence of that act, Bindner through his possession of the bill was able to obtain a delivery of the car from the Big Four and have it taken out to the camp, where it remained after rejection of the potatoes by the government under Kelsey's contract until the potatoes became dam-



aged through freezing in zero weather. The fact that the Big Four did not take up and cancel the bill had absolutely nothing to do with the damage to the potatoes, or the resulting damage to the shipper, who finally took possession of them, reshipped them and sold them at a large loss.

But the shipper claims that the carrier's failure to take up and cancel the bill enabled Bindner to give it back to Kelsey, and he to the bank, so that the bank was in position to tender it back to the shipper when the latter demanded his money on the draft.

We are utterly unable to see how the fact that the bank got the bill of lading back injured the shipper in any way. The shipper's right of action against *his agent*, the Indianapolis bank, accrued when the bank violated its duty by parting with the bill of lading without requiring payment of the draft, which act resulted in a delivery of the car to Bindner, its movement to the camp and the consequent loss sustained through freezing while at the camp. The fact that the bank later regained possession of the bill, after Bindner, in the meantime, had obtained delivery of the car by virtue of his possession of the bill and after the damage was all done, and was able to tender it back to the shipper, who accepted its return under protest with knowledge of all the facts, could not affect the right of action accrued against the bank. The bank could not place itself in *status quo* for the simple reason that the bill of lading, while it was out of the hands of the bank, had been used to effect a delivery of the car. When it came back to the Indianapolis bank it was, as far as the bank and the shipper were concerned, a "cancelled" bill, because the car which it originally represented had been delivered. To the shipper or to anyone else, a bill which he knows has been used to obtain a delivery of the

car is a "cancelled bill" just as much as if it had the word "cancelled" stamped across its face.

There could be no question about petitioner's liability in this case if the Indianapolis bank, after having the uncanceled bill returned to it, had sold it to a purchaser in good faith and for value. Such a purchaser would have been protected under Section 11 of the Uniform Bills of Lading Act and under the law prior to the passage of that act as a bona fide purchaser. Such a purchaser is the only one who could be harmed by a failure to take up and cancel the bill, because he would give value for it without knowing that it had already been used to obtain a delivery of the car and in reliance upon what it purported to be on its face—a live contract representing a car of potatoes in the hands of the carrier issuing the bill. The bank did not sell the bill to a bona fide purchaser, but returned it to the shipper who accepted its return under protest with knowledge of all the facts.

The shipper surely stands in no better position than would the Indianapolis bank from whom he accepted the return of the bill under protest and with knowledge of all the facts. Yet, no one would seriously claim that the bank could have recovered from the carrier because the carrier failed to require a surrender and cancellation of the bill. The carrier, in legal effect, delivered the car to the bank by disposing of it as requested by Bindner, the bank's assignee of the bill by delivery. The bank could not turn around after such delivery and say to the carrier: "It is true that you delivered the car to me and I took it out to the camp and let the potatoes freeze, but when you delivered it to me, you did not compel me to surrender the bill as required on its face, and therefore committed a breach of contract in that respect. You did not compel me to surrender it, as the bill required. I did not insist that you take it up, as the bill required, and as

I now insist you should have done. Neither of us insisted upon a compliance with that clause of the bill. Both of us waived it. The only result is that I and not you now have the bill. Yet, I ask you to pay me the value of the potatoes which you delivered to me and you must pay because you did not require me to surrender the bill."

### CONCLUSION.

The Uniform Bills of Lading Act was most carefully and skillfully drawn to accomplish two things, namely, the negotiability of bills of lading by endorsement and by delivery so that they would provide a convenient method of transferring title to property in the hands of carriers, and protection of all parties concerned insofar as it is legally possible where a negotiable instrument is involved. The statute fully accomplishes the purpose intended. As applied to the facts in this case, it protects the rights of all parties. The shipper is protected because delivery has been made to the person who had the bill of lading—to his assignee by delivery—and if such person or his transferor obtained it from the bank without being required to pay the draft, then the bank is responsible to the shipper. The shipper cannot impose liability on the carrier merely because the shipper's own agent, the bank, violated its duty by parting with the bill without requiring payment of the draft. The carrier is protected as against the shipper because it made delivery to a person in possession of the bill—a person to whom the shipper expressly authorized delivery by endorsing the bill of lading in blank and giving it circulation. Innocent third parties are protected because if they buy the unsurrendered and uncanceled bill in good faith and for value, the carrier is liable to them on the bill notwithstanding delivery was made to the person in possession of it.

We respectfully submit that the decision of the Supreme Court of Michigan is clearly erroneous, that it in effect nullifies the most important and controlling portions of the Federal Uniform Bills of Lading Act, and that for the protection of shippers, as well as carriers, their respective rights under the statute should be passed upon and finally determined by this Court. We therefore ask that this Court grant the Writ of Certiorari.

OSCAR E. WAER,  
JOHN C. SHIELDS,  
Counsel for Petitioner.

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APPENDIX.

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U niform Bills of Lading Act.

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## APPENDIX.

## UNIFORM BILLS OF LADING ACT.

(Act Aug. 29, 1916, c. 415; 39 Stats. at large 538.)

Section 1.—Bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.

Sec. 2.—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3.—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation, or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.

Sec. 4.—Order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: Provided, however, That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Sec. 5.—When more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America,

except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: Provided, however, That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Sec. 6.—A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgments of an informal character.

Sec. 7.—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.



Sec. 9.—A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 11.—Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 12.—Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 13.—Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 14.—Where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 15.—A bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an

accurate copy of an original bill properly issued, but no other liability.

Sec. 16.—No title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 17.—If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18.—If some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19.—Except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 20.—When goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 21.—When package freight or bulk freight is

loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bill of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 22.—If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused

by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

Sec. 23.—If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 24.—A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

Sec. 25.—If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

Sec. 26.—After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

Sec. 27.—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and

such person or a subsequent indorsee of the bill has indorsed it in blank.

Sec. 28.—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 29.—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Sec. 30.—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 31.—A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 32.—A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor

or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

Sec. 33.—Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiations shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 34.—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

- (a) That the bill is genuine;
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill;
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Sec. 35.—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 36.—A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or

from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 37.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 38.—Where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 39.—Where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 40.—Except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 41.—Any person who, knowingly or with intent to



defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violates, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.

Sec. 42.—First. That in this Act, unless the context of subject matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this Act.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee and to take as pledgee.

“State” includes any Territory, District, insular possession, or isthmian possession.

Sec. 43.—The provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 44.—The provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Sec. 45.—This Act shall take effect and be in force on and after the first day of January next after its passage.

## SUPREME COURT OF THE UNITED STATES.

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PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

vs.

J. F. FRENCH & COMPANY, Com-  
posed of Jay F. French and John  
Wallace,

Respondent.

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NOTICE.

To Messrs. Hall & Gillard, Attorneys for Respondent:

You are hereby notified: That the Petitioner, Pere Marquette Railway Company, will on Monday, June 2, 1919, or as soon thereafter as the motion can be heard, present to the Supreme Court of the United States the foregoing petition (a copy of which petition and brief in support thereof is herewith served upon you) and move the said Court to grant the Writ of Certiorari as prayed for therein.

*Oscar E. Waer*  
*John C. Shields*  
Counsel for Petitioner.



MAY 28 1919

JAMES D. MAHER;  
CLERK.

# Supreme Court of the United States

No. 26105  
Term, 1918.

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PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

vs.

J. F. FRENCH & COMPANY,

Respondent.

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**Brief of Respondent in Opposition to Petition  
for Writ of Certiorari.**

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CLARE J. HALL,  
JOSEPH R. GILLARD,  
Attorneys for Respondent.



# **The Supreme Court of the United States.**

No. 1029, OCTOBER TERM, 1918.

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**PERE MARQUETTE RAILWAY  
COMPANY,**

Petitioner,

vs.

**J. F. FRENCH & COMPANY,**

Respondent.

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**Brief of Respondent in Opposition to Petition  
for Writ of Certiorari.**

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## **THE FACTS.**

The statement of the facts in the case as set forth in the petition is not in all respects accurate and complete. To avoid repetition and confusion we refer the Court to record pages 163, 164, 165, 166 and 167, being the opinion of the Supreme Court of the State of Michigan, for a correct and concise statement of the material facts in the case, which for the purpose of this proceeding we adopt as our statement of the facts.

## THE LAW.

At the top of page two of the petition counsel states what he terms to be the question involved. As far as this case is concerned the first part of counsel's query is a moot question. This being true, the second part becomes immaterial.

A correct statement of the controlling fact in this case is a complete answer to the prayer of petitioner.

The petitioner agreed to transport a car of potatoes from Bailey, Michigan, to Louisville, Kentucky, and upon arrival there to notify Marshall & Kelsey, and to make delivery of the car only at Louisville. It delivered to respondent an order bill of lading whereby the car was:

"Consigned to order of J. F. French & Co.  
Destination—Louisville, State of Kentucky.  
Notify Marshall & Kelsey, c/o Captain Bernard,  
Commissary.  
At Camp Zachary Taylor, State of Kentucky.  
Route C. C. C. & St. L."

It transported the goods; it notified Kelsey. Then its agent, Mr. Smith, the car clerk of the Big Four at Louisville, and Mr. Bindner, the cashier of the Southern Railroad Company at Dumesnil, proceeded to make a new contract between themselves with reference to this car. Smith altered the waybill which accompanied the car by scratching out the word "Louisville" and inserting in place thereof the words, "Dumesnil, So. Ry." He then turned the car over to the Southern Railroad and allowed the freight charges which had accrued up to Louisville to follow the car. The Southern assessed freight charges of six cents a hundred additional and carried the car to Dumesnil. It arrived there under billing reading as follows:

"Consigned to order of J. F. French & Co.  
Destination—Dumesnil, State of Kentucky.



Notify Marshall & Kelsey, c/o Captain Bernard,  
Commissary.  
At Camp Zachary Taylor, State of Kentucky.  
Route Southern."

There are two controlling reasons why the prayer of petitioner should not be granted.

1. The facts of this case present no question to be decided by this court under the provisions of the Judicial Code and the decisions of the court.

2. If it should be held that this court has jurisdiction of the subject matter, the question in this case has been so explicitly foreclosed by prior decisions of this court as to compel the dismissal of the petition.

1. *The facts of this case present no question to be decided by this court under the provisions of the Judicial Code and the decisions of the court.*

The petitioner's case is based entirely upon that portion of section nine of the Federal Bills of Lading Act which reads as follows:

"That a carrier is justified . . . in delivering goods to one who is— . . . (c) a person in possession of an order bill for the goods. . . ."

In other words petitioner in effect admits that if it wasn't for that provision it would have had no defense to respondent's claim.

The Federal Bills of Lading Act (erroneously termed the Uniform Bills of Lading Act by counsel for petitioner) and especially the portion of section nine upon which petitioner relies is not applicable to this case for the reason that there was no delivery. Section nine justifies a carrier only when it makes delivery. If there was no delivery there can be no justification. We will show there was no delivery. On the contrary the Big Four committed an unlawful reconsignment of the car.

A reconsignment is a well defined branch of the rail-

road service. In the case of *Doran & Co. vs. M. C. & St. L. R. Ry.*, 33 I. C. C. 523, the Commission said:

"In no case has the Commission condemned reconsignment as a service. The abuse and not the reasonable use of the practice has been the subject of criticism. If granted, subject to such restrictions as may be necessary to prevent the abuses to which the practice is susceptible, and conditioned upon the payment of a reasonable charge for the additional labor, costs and liability which the service imposes upon the carrier, there appear to be no substantial reasons for apprehension that a modification of the present rules of the carriers to the extent of permitting reconsignment on basis of the through rate will be attended with injurious results. Reconsignment prevails throughout the greater portion of the United States. \* \* \* These facts tend to strengthen the conclusion that reconsignment within reasonable limits is of benefit to the public and not without its advantages to the carrier."

In the case of *Justice & Co. vs. Penna R. R. Co.*, 26 I. C. C. 478, the Commission defined a reconsignment and a diversion and differentiated between the two. The definition is as follows:

"If the destination of a shipment is changed before arrival at the original billed destination it constitutes a diversion, but if made after arrival at such destination it is a reconsignment."

This car arrived at Louisville on November 9th, 1917. (R. 87.) Louisville was the destination of the car. The duty of the Big Four was two-fold, either to make delivery of the car to the proper person at Louisville, or at the expiration of forty-eight hours to put it in storage. The last mentioned duty is provided for by section five of the conditions on the reverse side of the bill of lading.

The only place at which the Big Four could lawfully do any act with reference to this car and properly dis-

charge its duty was at Louisville, Kentucky, and at no other place.

In the case of *North Penn. Rd. vs. Commercial Bank*, 123 U. S. 727, Mr. Justice Field, speaking for the court, at the bottom of page 733, said:

“Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods entrusted to him, *but also to deliver them to the party designated by the terms of the shipment or to his order, at the place of destination.*” (Italics are ours.)

We have italicized the words “at the place of destination” because that is the crucial point in this case and which petitioner seems to have lost sight of altogether.

Five days after this car had arrived at Louisville, Mr. Smith, the trackage clerk of the Big Four, at the request of Mr. Bindner reconsigned this car. There is no question about what constitutes a reconsignment. It is a change in destination after the car has arrived at its original billed destination. That the act of the Big Four constituted a reconsignment is proven absolutely by Mr. Smith's own action. Before he could get that car from Louisville to Dumesnil he had to make a change in the waybill which accompanied the car, and the change that he had to make was to alter the destination. He had to scratch out the word “Louisville” and write the word “Dumesnil” in its place. It was a reconsignment pure and simple.

Since the act of the Big Four constituted a reconsignment there is no necessity in this case for a construction of the Federal Bills of Lading Act. There is not any provisions in that act which justifies a carrier in reconsigning a shipment upon the telephonic request of a person in possession of an order bill for the goods. There is nothing in this case for the act to operate upon because

the facts of the case do not bring it within the terms of the act.

The Michigan Supreme Court held that the act of the Big Four was a reconsignment. Upon page 164 of the record the Court said:

"Plaintiff's reasons and claimed grounds of negligence which resulted in the damages sought to be recovered is a reconsignment of the car by the terminal carrier at Louisville for further movement over another line without authority of the assignee (should be consignee) at the destination point, or requiring surrender of the original bill of lading for cancellation."

And again upon page 175:

"But, eliminating him as a 'holder' under the strict statutory definition, it may be conceded that nevertheless, under subdivision (c) of Sec. 9, he was entitled to delivery of the shipment as a person in possession of the order bill endorsed in blank by the consignee. Defendant in fact, did not deliver the goods direct to him, but turned them over by an irregular reconsignment to another carrier on the strength of his statement that he had the bill, without asking for it or even seeing it, in admitted violation of its own rules and of the distinct provision on the face of the order bill under which it had received the consignment, that its surrender should be required before delivery."

In other words the Michigan Supreme Court held that for the purpose of this case it could concede that Bindner was a person in possession of a bill of lading to whom the carrier would be justified in delivering the goods, but held that the carrier did not deliver the goods but made an irregular reconsignment of them. The Supreme Court admitted the very point for which petitioner contends but said that its contention could not control in this case because the contention was not applicable to the facts in the

case. There was no delivery. There was a reconsignment.

The Michigan Supreme Court decided this case on common law principles. The common law rule was that in order for a carrier to discharge its duty it must make a delivery of the goods at the place of destination. This was not accomplished, but on the contrary the carrier sent them to another destination. In so doing it converted the goods to its own use and became liable under the well established principles of common law, regardless of any statutes.

The rule of this court under such circumstances was stated by Mr. Justice Holmes in the case of *Arkansas Southern Railroad Company vs. German National Bank*, 207 U. S. 270. The particular portion of the opinion to which we refer is found on the bottom of page 275 and is as follows:

"But according to the well settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong.  
 \* \* \* Therefore, if we should be of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion its views were right or wrong."

We think that we have proven our first proposition and that the prayer of petitioner should be denied.

2. *If it should be held that this court has jurisdiction*

*of the subject matter, the question in this case has been so explicitly foreclosed by prior decisions of this court as to compel the dismissal of the petition.*

Counsel for petitioner endlessly repeat that the Big Four delivered the car to Mr. Bindner, who asked Mr. Smith to send the car out to the camp by turning it over to the Southern Railroad and cite record page 89 in support of the statement. The record does not support counsel's statement. Mr. Bindner did ask Mr. Smith, "Why don't you send it out?" but Mr. Bindner did not say anything to Mr. Smith about turning it over or delivering it to the Southern Railroad.

In the same paragraph counsel after stating that Mr. Smith turned the car over to the Southern and the Southern took the car out to the camp, say:

"This surely was just as much a legal delivery of the car to Bindner as if the Big Four had placed it on a team track in Louisville at his request."

That statement is not good law. We refer the Court to the case of *Salmon Falls Mfg. Co. vs. Tangier*, 21 Fed. Cas. No. 12, 267, p. 266, wherein the Court defined the meaning of the word "delivery" as used in bills of lading, as follows:

"There may be a constructive or symbolical delivery in its legal effect equivalent to an actual delivery. \* \* \* In these cases though there is no passing the goods from hand to hand, traditio, there is a legal transfer of the possession, and the risk of the goods is shifted to the purchaser, or to the person to whom the delivery is made under any other contract, as though they had actually been put into his hands. A delivery in the strict and proper sense of the word seems to me always to imply this transfer of the possession, actual or legal, and with it its rights and responsibilities attached to the possession. One consequence involved in this doctrine is that to complete the legal delivery there must be an acceptance, actual or implied. This, as I think, is

the sense in which the word is used in bills of lading, and in the delivery of the goods. \* \* \* The second obligation, that to deliver remained to be performed. Now, this is an act which the master cannot perform alone. All that the master can do alone is to deposit the goods at the place where the delivery is to be made and offer them to the owner named in the bill of lading."

In order to comply with this rule there must have been a transfer of the possession of the goods to Mr. Bindner and the risk of the goods and the rights and responsibilities attached to possession must have passed from the respondent in this case to Mr. Bindner, and there must have been an actual or implied acceptance of the goods by Mr. Bindner.

Everyone of these elements is entirely lacking in this case.

When the car arrived at Dumesnil it moved under billing by which it was consigned to the order of J. F. French & Company, and not to Mr. Bindner, either in his capacity as agent or in his personal capacity. (R. 82.) The Southern Railway did not accept the goods, nor did Mr. Bindner. This is shown by the fact that on the 4th of December Mr. Bindner wrote and sent a message to H. E. Moseley, the respondent's agent at Grand Rapids, that the car in question was on the line of the Southern Railway Company rejected. (R. 43.) Mr. Bindner did not accept the goods or they would not have been rejected. Mr. Bindner did not assume any of the rights or responsibilities of possession. He did not pay the freight charges, nor did he become liable for them. The freight charges which had accrued up to the time the car arrived at Louisville were allowed to follow the car to Dumesnil, and an extra freight charge of six cents per hundred was added thereto. In addition \$70.00 demurrage accrued while the car was at Dumesnil. Mr. Bindner did not be-

come responsible for these. In fact, as far as this record goes, Mr. Bindner never saw the car—never saw the potatoes in it. He did absolutely nothing with or about the car or its contents. How then can it be said that there was a delivery of the car to Mr. Bindner or to the Southern Railway?

When the respondent learned the situation, about December 7th, and deemed it to be its duty to dispose of the potatoes to the best advantage in order to make its loss as light as possible, it was compelled to and did pay the freight from Bailey, Michigan, to Louisville, Kentucky, and the freight from Louisville, Kentucky, to Dumesnil, Kentucky, and the demurrage which had accrued at Dumesnil and a reconsigning charge to get the car from Dumesnil to Memphis, where the potatoes were finally disposed of. If there had been a delivery to Mr. Bindner he would have been compelled to have paid all of these charges and to have disposed of the contents of the car.

The situation in this case is not new to this court, in fact it has explicitly decided that such a state of facts constitute a misdelivery or a conversion of the goods.

In the case of *Georgia, Etc., Ry. vs. Blish Co.*, 241 U. S. 190, the Blish Milling Co. shipped from Seymour, Indiana, to Bainbridge, Ga., a carload of flour, consigned to its own order with directions to notify Draper-Garrett Grocery Company at Bainbridge. The shipper's sight draft upon the notify party covering the price of the flour was attached to the bill of lading and forwarded to a bank in Bainbridge for collection. Upon its arrival at destination, the carrier without requiring payment of the draft and surrender of the bill of lading (which were ultimately returned to the Blish Milling Co.) delivered the car to the Draper-Garrett Grocery Company immediately upon its arrival by placing it on the sidetrack of



that company. In the course of unloading the Grocery Company discovered that some of the flour was wet and thereupon reloaded the part removed and returned the car of flour to the railway company. In affirming a judgment against the carrier for the value of the flour, Mr. Justice Hughes, who delivered the opinion of the court, said on page 195:

“But delivery must mean delivery as required by the contract and the terms of the stipulation are comprehensive—fully adequate in their literal and natural meaning, covering all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a failure to make delivery as when the goods have been lost or destroyed. \* \* \*

The only difference in the facts between that case and the case at bar is that the present is a stronger one, if anything, against the carrier than the Blish case. In that case the carrier turned the goods over to a person who was not entitled to them at the original billed destination. In the case at bar the carrier turned the goods over to another carrier who was not entitled to them, to be transported to an entirely different destination. But the legal principle is the same in both cases, viz., delivery must mean delivery as required by the contract and the contract in this case required delivery at Louisville and at no other place.

One of the incidents of a delivery is the extinguishment of the lien of the carrier in question for its transportation charges. When a carrier makes delivery its right of possession to goods and its common law lien ceases. But such was not the fact in this case. The carrier still had a lien for the freight charges which had lawfully accrued under the contract and it unlawfully assessed charges for carrying the goods to a different destination, and respondent was compelled to pay them. These goods were

at all times in possession of the carrier and the duty of the company had not been fulfilled by a delivery. There was no more delivery in this case than there was in that of *Hunting Elevator Co. vs. Bosworth*, 179 U. S. 413.

In the case of *North Penn. Co. vs. Commercial Bank*, supra, the goods were shipped upon order bills of lading with directions to notify certain persons. Drafts for the value of the goods were attached to the bills of lading and deposited in a bank by the shipper and he received the money therefor. Immediately upon the arrival of the goods the carrier unloaded them in stockyards without giving any notice that they were to be held subject to the order of the shipper. The notify party received them without surrendering the bill of lading and without payment of the draft. The court on page 337 states its conclusions, as follows:

"It follows from these views that the defendant, the North Penn. Company in allowing the cattle to go into the possession of the Bankers, through its agent, the Drove Yard Company, without the order of the consignee, who as stated above was also the owner and shipper, became responsible for their value to the Commercial National Bank which held its orders endorsed on the receipts for the shippers. \* \* \*

That conclusion was based upon the following statement of the rule as to delivery, found on page 734:

"But notwithstanding this difference in duties and responsibilities the railroad company when it undertakes generally to carry such freight becomes subject under similar conditions to the same obligations so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them, if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier whether the freight consists of goods or of livestock is more strictly enforced."

If a turning over of the cattle in that case to an agent without instructing him that the goods were to be held by the agent until orders were received from the shipper as to their disposition, was a misdelivery, how much more so was the act of defendant in this case in sending the goods to an entirely different destination.

There is still another reason why the act of the Big Four was not a delivery. Section ten of the conditions on the reverse side of the bill of lading is as follows:

"Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof, hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect and this bill of lading shall be enforceable according to its original tenor."

As we have before pointed out, before Mr. Smith could get this car to Dunesail he had to change the waybill which accompanied the car. It will be noted that the original waybill contained exactly the same directions as the original bill of lading. In fact without a bill of lading there can be no waybill. The latter depends entirely for its existence upon the former. If it required a change in the waybill to get this car from Louisville to Dunesail that change could not properly have been made without the change having been endorsed upon the bill of lading in accordance with the provisions of section ten.

This furnishes the reason why the Federal Bills of Lading Act provides that a carrier may be justified by delivering to a person in possession of the bill, but does not contain such a provision with reference to a re-shipment. A delivery can only take place at the original billed destination. In order to make delivery at the original billed destination no change is necessary in the waybill, or in the bill of lading. The carrier, of course, should obtain the surrender of the original bill of lading when making delivery at the original destination, but if it sees

fit to take a chance it has that privilege. But in order to make a reconsignment there must be a change in the bill of lading, and in order for that change to be effective it must be endorsed upon the bill itself, and the carrier must have the bill in its possession in order to endorse the change upon it. That is why the Federal Bills of Lading Act does not provide that a carrier is justified in making a reconsignment of goods to a person in possession of the bill. In such a case the bill must be surrendered so that the carrier can endorse the change upon it.

We think that the foregoing discussion clearly demonstrates either that there is no federal question in this case, or if there is one that the act of the petitioner was a clear misdelivery of the goods under the prior decisions of this court and that there is no occasion for a review of this case by this court.

It remains to answer a few of the statements made by petitioner in its brief.

At the bottom of page 12 counsel make this statement:

"The Big Four had the right to reassign, reship, or do anything else with the car at the request of Bindner, who by virtue of his possession of the bill of lading controlled the car after it reached its destination at Louisville, just as much as if he had been the original shipper."

That statement is correct as far as it goes but an important element is left out. We will state it correctly:

"The Big Four had the right to reassign, reship, or do anything else with the car at the request of Bindner, who by virtue of his possession of the bill of lading controlled the car after it reached its destination at Louisville, just as much as if he had been the original shipper, provided, however, that when he requested the reconsignment or the reshipment he delivered the original bill of lading to the Pere Marquette Railway Company (not the Big Four) and caused an endorsement of the reconsignment to be

endorsed upon the original bill of lading, and to be signed by the Pere Marquette Railway Company."

On page 14 counsel make this statement:

"After endorsing his bill of lading in blank and giving it circulation, the shipper no longer had a contract with the carrier. It was the Grand Rapids bank, and in turn the Indianapolis Bank, then Kelsey and then Bindner who had the contract with the carrier."

Neither of these sentences correctly state the law. The contract was still between the shipper and the carrier. There was no change in the contract parties. The title of the contract however had passed from the respondent to the Grand Rapids Savings Bank.

The second proposition stated in the sentence above is equally erroneous. The Grand Rapids Savings Bank became the owner of the bill of lading. The Indianapolis Bank never became the owner, nor did Kelsey, nor did Bindner, and none of these three ever had a contract with the carrier. The Indianapolis Bank was the agent of the Grand Rapids Savings Bank for the purpose of collecting the draft which was attached to the bill of lading and upon the payment of the draft it was to deliver the bill of lading to Mr. Kelsey. It had absolutely no title to the bill nor contract with the carrier.

At the bottom of page 16 counsel inquire, "What is the meaning of sections 8, 9, 10 and 11 of the Federal Bills of Lading Act, unless they mean that the carrier is justified in making delivery to a person in possession of the bill?"

For the purpose of this argument only we concede that these sections do mean that a carrier is justified in making delivery to a person in possession of the bill, but we say that they have no application to this case because no delivery was made.

On pages 19 to 21 counsel discuss the case of *Famous Mfg. Co. vs. Railroad*, 166 Ia. 361. That case is no authority for the proposition contended for by the petitioner in this case. The Iowa Court held that the bank in that case was a person in possession of the bill of lading and was, therefore, entitled to possession of the goods. It directed the delivery of the goods to the notify party at Fulton, Illinois, which was the original contract destination. The court held that the carrier was justified in so doing.

Permit us to digress here just a minute for the purpose of calling the attention of the Court to the fact that this case was decided two and one-half years before the Federal Bills of Lading Act became effective, and the Court laid down the common law rule which in 1916 was incorporated in section nine of the Federal Bills of Lading Act. This merely shows that the act does not change the common law rule, at least as declared by the Iowa Court, but is simply declaratory of it.

The Supreme Court of Michigan conceded that Mr. Bindner was a person in possession of the bill of lading, entitled to delivery of the goods, and therefore its decision was entirely in accord with the rule advanced by the Iowa Court, but as previously pointed out the Michigan Supreme Court held that there was no delivery. That on the contrary there was a reconsignment. The reason why the Iowa case is not applicable to this case is that Bindner, the party in possession of the bill, did not request a delivery but requested a reconsignment, and this reconsignment was unlawfully committed by the Big Four.

Therefore, when counsel on page 21 say that the material facts in the two cases are identical and that the claims of the respective shippers are identical, he is not stating the proposition correctly.

At the top of page 21 counsel state as follows:

"The shipper claims that Bindner had no authority to direct a delivery to the Southern Railroad, that the Big Four was bound to ascertain the extent of Bindner's authority, and that the Big Four's delivery of the car without an actual surrender of the bill of lading was unauthorized and rendered it liable for a conversion of the car."

Those are not the claims of the shipper in any particular. Our claims may be stated as follows:

The shipper claims that Bindner had no authority to direct the Big Four to reconsign the car from Louisville to Dumesnil without a surrender of the original bill of lading, and an endorsement of the reconsignment thereon. That the Big Four was bound to ascertain that Bindner was a person in possession of the bill of lading according to the natural, plain and ordinary signification of the word "possession," and that the Big Four's reconsignment of the car from Louisville to Dumesnil without an actual surrender of the bill of lading, and an endorsement of the reconsignment thereon, was unauthorized and rendered it liable for conversion of the car.

It may not be out of place to state at this point that in our judgment Bindner was not a person legally in possession of a bill of lading under the terms of section nine of the Act. Mr. Bindner's testimony was as follows:

"Q. Well, what were his (Kelsey's) detailed instructions to you?

A. Why, he had several bills of lading, five or six different times, sometimes one, two, three, and he came in the office and asked me—he had a whole lot of stuff in his pockets, and I reckon he knew the value of order notify bill of lading and so he asked me to keep them for him and so I did. I took them and chucked them in a drawer.

Q. And that is the way you held them all the time?

A. Yes, sir.

Q. And they were in your charge all the time?

A. I was holding them for him.

The Court: Weren't you holding them for the Southern Railroad?

A. No, sir. \* \* \* (R. 75-76.)

Q. Well, at the time you called the Big Four you held that bill of lading for Kelsey?

A. Yes.

Q. And you always held it for Mr. Kelsey?

A. Yes.

Q. And when you delivered it back, you delivered it to Kelsey?

A. Yes, sir.

Q. And for no other purpose?

A. For no other purpose.

Q. And you did not hold it at any time in your capacity as an agent or employe of the Southern Ry.?

A. I did not, no, sir. \* \* \* (R. 77.)

Q. Well, did Mr. Kelsey tell you to tell the Big Four that you had the bill of lading?

A. The bill of lading?

Q. Yes.

A. No, sir.

Q. He did not?

A. No, sir.

Q. You did that on your own hook?

A. Yes, sir.

Q. How did you come to do it?

A. Because the car was overdue and I looked at the routing on the bill of lading and it was routed Big Four and I called Mr. Smith.

Q. As long as you had it what difference did it make?

A. It would make a whole lot of difference when the government needs potatoes.

Q. Well, had the government told you that they needed the potatoes?

A. They always need them.

Q. Well, then you were acting in rather the capacity of kind of helping the thing along to get the car out there? You knew the government needed potatoes?

A. Yes.



Q. Because you knew the government needed potatoes?

A. Yes, sir.

Q. And you just wanted to let them know as a matter of information that you held the bill of lading?

A. That I held the bill of lading so that the car would not be delayed." (R. 77-78.)

Under this testimony, which is undisputed, it does not seem possible that Mr. Bindner could be construed to be a person in possession of a bill of lading for the purpose of obtaining delivery of these goods according to the provisions of section nine of the Federal Bills of Lading Act.

While counsel seek to raise a legal defense to this action by claiming a delivery under section nine, their real claim is that respondent should have sued the Indianapolis bank instead of it, and on pages 23 to 25 they seek to show that the bank is the only one liable. That contention is not correct.

For the purpose of argument let us assume that we had sued the Indianapolis bank and it had said in defense, we entrusted Mr. Kelsey with this bill of lading as our agent, so that he could present it to the railroad company and inspect the goods before he decided whether he would accept them or not, and that after he had inspected the goods he was to return the bill of lading to us. Mr. Kelsey knowing the value of a bill of lading and having no proper place to keep them asked Mr. Bindner to keep them for him until such time as he should call for them. (See Bindner's testimony, R. 75.) Our reply would be, well but Mr. Bindner told the Big Four that he had the bill of lading and asked it to reconsign the car to Dumesnil and it did so and that has caused us damage. The bank's reply to that would be, that may be true but in acting upon Bindner's request the railroad committed a

wrong. It had no right to reconsign that car until it had the bill of lading in its possession. It had no right to pay any attention to Bindner. It was wrong for the railroad company to send that car to Dumesnil and it was the sending of the car to Dumesnil which caused the damage in this case. While we may have done wrong as far as the shipper was concerned in entrusting this bill of lading to Kelsey, the proximate cause of the injury was the wrong committed by the Big Four in making a reconsignment of this car without an endorsement of it upon the original bill of lading as the contract expressly provided for.

We all know that there may be two causes of the damage, one remote and one proximate. It is the one who has been guilty of the proximate cause of the injury that is liable.

The first, third and fourth reasons given by petitioner as to why the writ should be allowed are in substance that the decision of the Supreme Court of Michigan nullifies the Federal Bills of Lading Act and destroys the negotiability of bills of lading. Counsel have failed to point out in what particular the decision of the Supreme Court has accomplished this deplorable state of affairs. The Michigan Supreme Court in its opinion quoted from petitioner's brief what it claimed the issues in the case were and conceded in accordance with the claim of petitioner that Bindner was a person in possession of the bill of lading and was entitled to delivery of the goods, but said that the petitioner could not avail itself of the provisions of the Federal Bills of Lading Act because the facts of the case didn't bring it within the terms of the act; that there was no delivery as petitioner claimed but that there was a reconsignment which was not covered by the act.

Counsel state that this case involves but one car of potatoes and the transaction out of which it arises in-

volves twelve other cars over which other suits are pending in which this same question is in issue, and further, that the provisions of the Federal Bills of Lading Act has never been passed upon by this court.

We think that these reasons do not come within the rule with reference to the issuance of writs of certiorari. The trial court decided the law of the case in favor of respondent and the Supreme Court did likewise. There was no dissenting opinion in the Supreme Court. There is no conflict of decisions in state courts or federal courts or between state and federal courts with reference to the construction of the Federal Bills of Lading Act. The case can be and was properly disposed of on common law principles without reference to the act, indeed the facts in this case do not bring it within the terms of the act. The reasons given by petitioner are entirely inadequate to warrant the granting of the relief prayed for.

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### CONCLUSION.

The power to grant a writ of certiorari is sparingly exercised. The judgment in this case was for \$689.20. It has been tried in the Kent Circuit Court and in the Michigan Supreme Court. The decisions of both courts were in favor of plaintiff, being based upon common law rules. As far as this proceeding is concerned we think the only question for this court to determine is whether the act of the Big Four at Louisville constituted a reconsignment or a delivery. If it constituted a reconsignment as held by the Michigan Supreme Court this court has no jurisdiction of the case in any event. If there was a delivery it was not accomplished at the original bill destination, and under the decisions of this court that act constituted a misdelivery and was not a performance of the contract.

We think that no valid reason has been shown why this court should review the decision of the Michigan Supreme Court in this case and we believe that the writ should be denied.

Respectfully submitted.

CLARE J. HALL,  
JOSEPH R. GILLARD,  
Attorneys for Respondent.

FEB 25 1920

JAMES B. HENRY,  
CLERK.

# Supreme Court of the United States

OCTOBER TERM 1919.

No. [REDACTED] 105

**PERE MARQUETTE RAILWAY  
COMPANY,**

Petitioner,

vs.

**J. F. FRENCH & COMPANY.**

**BRIEF FOR PETITIONER**

Pere Marquette Railway Company

and

**APPENDIX**

Containing Uniform Bills of Lading Act.

**OSCAR E. WAER,**

**JOHN C. SHIELDS,**

Counsel for Petitioner.

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OCTOBER TERM 1919.

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PERE MARQUETTE RAILWAY  
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## BRIEF FOR PETITIONER PERE MARQUETTE RAILWAY COMPANY

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### STATEMENT OF FACTS.

This case arises under the Federal Uniform Bills of Lading Act passed in 1916 (Act of August 29, 1916, Chap. 415; 39 Stats. at Large 539), sections 8, 9, 10 and 11 of which read as follows (the whole act is printed as an appendix to this brief):

"Sec. 8.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such demand is accompanied by—

(b) Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill which was issued for the goods, if the bill is an order bill."

"Sec. 9.—A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the good are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."

"Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

"Sec. 11.—Except as provided in Section 26, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been is-



sued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

In November, 1917, respondent (hereinafter referred to as the "shipper") shipped a carload of potatoes from Bailey, Michigan, to Louisville, Kentucky, over the Pere Marquette Railway Company, the petitioner, as initial carrier, and the Big Four Railroad as connecting and terminal carrier, the Pere Marquette being sued as initial carrier under the Carmack Amendment. The car was one of some forty other cars of potatoes shipped as part of the same deal and sold to the firm of Marshall & Kelsey of Indianapolis, Indiana (R. 6), which firm had in turn made a contract for a sale of the potatoes to the quartermaster at Camp Zachary Taylor, a government cantonment located just outside of the City of Louisville (R. 6). The Big Four runs into the City of Louisville proper, but its line does not run out to the camp (R. 7). Freight destined to the camp is carried from the City of Louisville to the camp by the Southern Railroad, which has a station at the camp called Dumesnil (R. 7).

The shipper obtained from the Pere Marquette the usual negotiable order bill of lading in which the car was consigned to the order of the shipper at Louisville, Kentucky, and which bore the notation, "Notify Marshall & Kelsey, c/o Captain Bernard, Commissary, Camp Zachary Taylor" (R. 7). The bill of lading, in common with all order bills of lading in use at the time and for a long time prior to the passage of the Uniform Bills of Lading Act, contained on its face a clause reading, "The surrender of this original order bill of lading properly en-

dorsed shall be required before the delivery of the property" (R. 104).

The shipper endorsed the negotiable order bill of lading in blank, drew a draft on Marshall & Kelsey, and deposited both draft and endorsed bill of lading with its bank in Grand Rapids, Michigan, for collection, and the bank forwarded them to the Commercial National Bank of Indianapolis, Indiana, for the same purpose (R. 7).

The Indianapolis bank, without requiring payment of the draft, turned the bill of lading endorsed in blank over to Mr. Kelsey, of the firm of Marshall & Kelsey, the notify party named therein (R. 7).

Mr. Kelsey took the bill of lading endorsed in blank to Camp Taylor and turned it over to one James Bindner, the cashier, and one of the men in charge, of the Southern Railroad Station at the camp (R. 7). Bindner had the bill of lading in his possession when the car which it covered arrived at its destination in Louisville (R. 44). Upon learning of its arrival through a telephone inquiry, he asked the Big Four to send the car out to the camp (R. 59.) Mr. Kelsey had told him to call up the Big Four about the car (R. 49). Mr. Kelsey had also gone to the office of the Big Four before the car arrived and had told the agent that Mr. Bindner had the bill of lading in his possession (R. 63, 64), and, after the arrival of the car at Louisville, Mr. Kelsey had gone to the office of the Big Four and paid some demurrage charges on the car so that the car would be released by the Big Four to be taken out to Dumesnil (R. 51, 63).

The Big Four, after receiving Bindner's telephone request to send the car out to the camp (R. 59), after being paid the demurrage by Mr. Kelsey (R. 63), and upon the assurance of Mr. Kelsey and Mr. Bindner that the latter had the bill of lading in his possession (R. 59, 63), deliv-

ered the car to the Southern Railroad for transportation to the camp (R. 59, 63).

The agent of the Big Four who made delivery of the car to the Southern Railroad did not know, and neither Bindner nor anyone else told him, that there was anything unusual about the bill of lading (R. 50, 59). He had no knowledge that the draft covering the car had not been paid, and knew nothing about the circumstances under which the bill of lading came into Mr. Kelsey's or Mr. Bindner's hands (R. 50, 59). He did know that Bindner had the bill of lading endorsed in blank in his possession, having received this information both from Mr. Bindner and from Mr. Kelsey (R. 63). That Mr. Bindner actually had the bill of lading in his possession is not disputed (R. 7). The shipper's own agent saw it while it was in Bindner's hands and while the car was at Dumesnil (R. 25, 26).

The Southern took the car out to the camp where it arrived November 18th (R. 46). At about the same time the shipper learned from Marshall & Kelsey that the government had rejected other cars shipped by him, because the potatoes were suffering from field frost, and sent an agent to Louisville and Dumesnil to investigate (R. 7, 8). Shipper's agent found the car in suit at Dumesnil and learned also that the bill of lading was in the hands of Bindner (R. 8). Shipper's agent stayed at Dumesnil until November 30th handling and sorting other cars, part of which the government accepted (R. 8.) The car in suit was not sorted and was finally refused by the government on November 28th (R. 8). Thereafter and on December 2nd, shipper sent his attorney to the Indianapolis bank to demand payment of the draft, which was refused (R. 8). The bank admitted that it had turned the bill of lading over to Mr. Kelsey without requiring payment of the draft (R. 8, 9). On Decem-

ber 3rd, however, Mr. Kelsey went to Mr. Bindner at Dumesnil and succeeded in getting back the bill of lading which Bindner had had in his possession during all of this time, took it back to the bank, which in turn tendered it back to the shipper's attorney when he returned to the bank on December 4th (R. 9). Mr. Bindner explains his action in returning the bill to Kelsey by saying that he held it for him all the time as his agent and therefore returned it to him at his request (R. 48, 49). The shipper's attorney asked the bank for further time to consider, and after making a further investigation at Louisville, came back to the bank, and with knowledge of all the foregoing facts, and of all that had occurred (R. 7-9) accepted the return of the bill from the bank under protest; and the shipper, in order as he says, to handle the potatoes and save them from a total loss, took possession of them, reshipped them to Memphis, Tennessee, and sold them at a loss over the invoice price to Marshall & Kelsey, which loss he seeks to recover in this case (R. 9).

The shipper claims no negligence in the transportation of the car from point of origin to Louisville, and makes no claim that any damage resulted through the reshipment of the potatoes from Dumesnil to Memphis, Tennessee (R. 18, 20, 27). The shipper's sole claim was, and the trial court charged the jury that the act of the terminal carrier in turning the car over to the Southern Railroad without requiring a surrender and cancellation of the bill constituted a conversion of the car and made the carrier liable for its value less the amount realized on it when the shipper finally sold it (R. 32, 92, 95). The Supreme Court of Michigan affirmed the case (R. 105-113—Opinion of Court).

The petitioner's claim is, that the facts in this case bring it squarely within the plain and unambiguous terms of the Uniform Bills of Lading Act above referred to, in that the terminal carrier,—

(a) Delivered the car to a person in possession of an order bill for the goods endorsed in blank by the consignee by delivering it to the Southern R. R. at the request of Bindner who had the bill in his possession, and in that—

(b) The terminal carrier's failure to take up and cancel the bill made it liable only to one who in good faith and for value might acquire such bill, and did not make it liable to the shipper in this case, who took back the bill with knowledge of all the facts after it had been used to effect a delivery of the car, and who was in no way damaged by the failure to take up and cancel the bill.

### ERRORS RELIED ON.

As already indicated, the only question in the case is: Was the Big Four justified, under the Uniform Bills of Lading Act, in making a delivery of the car to the Southern Railroad at the request of Mr. Bindner, who had possession of the endorsed bill of lading? This question was raised in the Trial Court by motions to direct a verdict and by requests to charge, but it is necessary to refer only to the errors assigned upon the refusal of the trial court to charge as requested, and upon the charge as given (Assignments of Error Nos. 3, 4, 5; R. 100-102), as these fully cover the only question here involved. The Supreme Court of Michigan disposed of the case and affirmed it on these Assignments of Error (R. 106).

The petitioner requested the Trial Court to charge the jury as follows:

1. The Court instructs you that this action is brought under the so-called Carmack Amendment to the Interstate Commerce Act (Sec. 20 of said act), the defendant being sued as the initial carrier of a shipment of a carload of potatoes moving from Bailey, Michigan, to Louisville, Kentucky, over the Pere Marquette Railroad, the initial carrier, and over

the Big Four the connecting and terminal carrier, This case therefore involves a construction of the said Carmack Amendment, and it also involves a construction of the so-called Uniform Bills of Lading Act, being Act of Congress of August 29, 1916, and federal questions are presented for determination.

The Uniform Bills of Lading Act provides in part as follows:

(Act Aug. 29, 1916, c. 415, Sec. 9). A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or,

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee. (39 Stat.)

(Act Aug. 29, 1916, c. 415, Sec. 10.) Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and

must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods. (39 Stat.)

(Act Aug. 29, 1916, c. 215, Sec. 11.) Except as provided in section twenty-six, and except when compelled by legal process if a carrier delivers goods for which an order bill had been issued the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto. (50 Stat.)

The evidence in this case as to the question of delivery is undisputed, and the question of whether or not there was a rightful or wrongful delivery of the car in question is therefore a question of law for the court. The undisputed evidence in the case shows that the Big Four Railroad Company, the terminal carrier named in the negotiable bill of lading under which the shipment in question moved, delivered the car in question upon its arrival at destination to a person in possession of the order bill of lading for the goods which had been endorsed in blank by the consignee without any notice or knowledge at the time of the delivery that the person to whom delivery was made was not lawfully entitled to the possession of the goods. The court instructs you, as a matter of law, that the terminal carrier, the Big Four Railroad, was justified in making such a delivery and that the contract of carriage was thereupon performed so that all liability of the defendant in this case as initial carrier ceased. (R. 94, 95).

"2. The Court further instructs you that the plaintiff in this case is the original shipper and the original consignee named in the negotiable order bill of lading which was endorsed in blank, and the plaintiff does not by its declaration, and cannot, claim that it is bringing this suit as a good faith purchaser for value of the bill of lading. As the plaintiff is not

a good faith purchaser for value of the bill of lading in question it cannot recover against the defendant on the ground that the terminal carrier, the Big Four Railroad Co., failed to take up and cancel the bill when it made delivery of the car to the person in possession of the bill endorsed in blank by the consignee. The failure of the terminal carrier to take up and cancel the bill upon delivery of the car to the person in possession of the bill imposes no liability upon either the terminal carrier or the initial carrier, except to a good faith purchaser for value of the negotiable bill of lading. The plaintiff in this case not claiming by its declaration to be such good faith purchaser for value, and not showing in any way that it is such good faith purchaser for value, your verdict must be for the defendant." (R. 95).

The trial court refused so to charge, upon which refusal error was assigned (Assignment Nos. 3, 4, R. 100, 101); and charged the jury as follows:

The Court: Gentlemen of the jury, for reasons which I stated of record last night at the conclusion of a motion on the part of each counsel to direct a verdict, your attention will be called exclusively to the question of the plaintiff's damages. I have held as a matter of law under the undisputed facts in this case that this carload of potatoes was unlawfully delivered by the terminal carrier, the Big Four, at Louisville, Kentucky, to the Southern Railway Company, and that that unlawful delivery constituted a conversion of this car on the part of the common carrier giving the plaintiffs the right to recover damages against the initial carrier, the Pere Marquette Railway Company, the defendant in this case, for such conversion; and it is unnecessary at this time to go further into the reasons for the court's conclusion in that matter. As to whether or not the car was unlawfully delivered, you will have nothing to do in your consideration of this case, and, as I said, you will confine your consideration of the evidence in this case to the question of damages solely. (R. 95, 96).

Error was duly assigned on the charge thus given (Assignment No. 5, R. 102).



## ARGUMENT.

## I.

*Bindner was a Person in Possession of the Bill.*

As previously stated, the shipper in this case endorsed the negotiable order bill of lading which he obtained on the car *in blank*, drew a draft on Marshall & Kelsey, and deposited both draft and bill of lading with its bank at Grand Rapids, Michigan, for collection, and the bank forwarded them to the Indianapolis bank for the same purpose (R. 7). The Indianapolis bank, without requiring payment of the draft, turned the bill of lading endorsed *in blank* over to Mr. Kelsey (R. 7). Mr. Kelsey took the bill of lading endorsed in blank to Camp Taylor and turned it over to Mr. Bindner, who held it when the Big Four, the terminal carrier, turned the car over to the Southern at his request (R. 7, 44).

The claim made by Bindner that he held the bill of lading as agent for Kelsey can in no way affect the merits of the controversy. Mr. Kelsey himself went to the Big Four, the terminal carrier, and told its agent that he had turned the bill of lading over to Mr. Bindner (R. 63, 64). And after the arrival of the car at Louisville, Mr. Kelsey had gone to the office of the Big Four and paid some demurrage charges on it so that the car could be released by the Big Four (R. 51, 63). Mr. Kelsey had also told Mr. Bindner to call up the Big Four about the car (R. 49).

That Mr. Bindner had the bill of lading in his possession when the Big Four at his request and at Mr. Kelsey's request turned the car over to the Southern Railroad, is not disputed (R. 7, 25, 26).

The Supreme Court of Michigan states in its opinion that under subdivision (c) of Section 9, Bindner was en-

titled to a delivery of the car as a person in possession of the order bill endorsed in blank by the consignee (R. 113). That he was entitled to such delivery cannot be seriously questioned.

It will be remembered that under Section 8, a carrier is *bound* to deliver goods upon a demand made by the "holder" of the bill if the holder offers to *surrender* the bill, "holder" being defined by Section 42 of the Act as a "person who has both actual possession of such bill *and* a right of property therein", while under Section 9, a carrier is *justified* "subject to the provisions of the three following sections" in delivering the goods to one who is

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) *A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been endorsed by him, or in blank by the consignee, or by the mediate or immediate endorsee of the consignee."*

While Bindner may not have been a person lawfully entitled to the possession of the goods, *he was "a person in possession of an order bill for the goods endorsed in blank by the consignee."*

An order bill of lading endorsed in blank by the consignee is made by the statute a negotiable instrument and passes from hand to hand by delivery. When once endorsed in blank, it becomes in effect "payable to bearer", and any person having it in his possession (whether rightfully or wrongfully) is entitled to a delivery of the car which it covers. The endorsement in blank of an order bill creates a new contract in that thereafter the bearer instead of the original shipper, is the party with whom the carrier is justified in dealing. See Sections 27, 28, 30

and 31 of the act, which read as follows: (Italics are ours.)

Sec. 27.—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and *such person or a subsequent indorsee of the bill has indorsed it in blank.*

Sec. 28.—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 30.—An order bill may be negotiated by any person in possession of the same, *however such possession may have been acquired*, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 31.—A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) *The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.*

## II.

### *The Big Four Delivered the Car to Bindner.*

Bindner was a person in possession of the bill of lading, and the Big Four, the terminal carrier, was therefore justified in delivering the car to him. We again call the Court's attention to Section 8, 9, 10 and 11 of the Uni-

form Bills of Lading Act, the pertinent parts of which read as follows (The italics are ours):

"Sec. 8.—*A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made, either by the consignee named in the bill for the goods, or, if the bill is an order bill, by the holder thereof, if such demand is accompanied by—*

(b) *Possession of the bill of lading and an offer in good faith to surrender, properly endorsed, the bill, which was issued for the goods, if the bill is an order bill."*

"Sec. 9.—*A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—*

(a) *A person lawfully entitled to the possession of the goods, or*

(b) *The consignee named in a straight bill for the goods, or*

(c) *A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee."*

"Sec. 10.—*Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivision (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—*

(a) *Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or*

(b) *Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.*

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to

enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods."

"Sec. 11.—Except as provided in Section 26, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

It will be noted that under Section 8 a carrier is bound to deliver goods upon a demand made by the holder of the bill, if the holder offers to surrender the bill, "holder" being defined by Section 42 of the act as a "person who has both actual possession of such bill and a right of property therein", while under Section 9, a carrier is justified "subject to the provisions of the three following sections" in delivering the goods to a person in possession of the bill endorsed in blank by the consignee.

As previously shown, Bindner, whether he held the bill for Kelsey or for himself, was a person "in possession" of the bill of lading endorsed in blank by the consignee. While "in possession" of the bill he called the agent of the Big Four on the telephone, advised him that he (Bindner) had the bill of lading and asked him to send the car out to the camp by turning it over to the Southern Railroad (R. 59). Mr. Kelsey, who had turned the endorsed bill of lading over to him, had asked him to call the Big Four about the car (R. 49), and Mr. Kelsey himself had gone to the office of the Big Four before the car arrived and advised the Big Four that he had turned the bill of lading over to Mr. Bindner (R. 63, 64). After

the car arrived, Mr. Kelsey had again gone to the office of the Big Four and paid some demurrage charges on the car so the Big Four would release it (R. 51, 63).

Pursuant to Bindner's request that the car be turned over to the Southern for transportation to the camp, pursuant to Kelsey's act in paying the demurrage charges so that the Big Four would release the car, and in reliance upon Bindner's possession of the bill, the Big Four turned the car over to the Southern (R. 59, 63). The Big Four parted with it, and the Southern got it. Bindner admits that his request was complied with and the car turned over to the Southern, which brought it out to the camp (R. 46). This surely was just as much a legal delivery of the car to Bindner as if the Big Four had placed it on a team track in Louisville at his request.

When the car was turned over to the Southern, there was turned over with it the waybill (directions to train crew) which had accompanied the car from Bailey, Michigan, to Louisville, the agent of the Big Four, on turning over the car and waybill, having stricken out the word "Louisville" under "destination" and written in place thereof the words "Dumesnil, Ky., So. R. R." That is, instead of making out a new waybill, the agent of the Big Four merely changed the one that had already been used and turned it over to the Southern (R. 59). The Southern carried the car out to the camp on this same waybill and charged a local rate of 6 cents per cwt. against the car for the transportation service.

Counsel claimed in the Michigan Supreme Court that this constituted a "reconsignment" instead of a "delivery", because there was a "change in the destination of the car after it arrived at Louisville." If it was a reconsignment, a change of destination—it was a reconsignment and change of destination *at the request of the*

*person in possession of the bill of lading—Bindner—*  
and therefore a delivery to Bindner.

The Supreme Court of Michigan in its opinion also says the Railroad Company "did not deliver the goods direct to him (Bindner), but turned them over by an irregular reconsignment to another carrier on the strength of his statement that he had the bill of lading." (R. 113).

We are utterly at a loss to understand what difference it made because the Big Four did not deliver the car "direct to Bindner", but turned it over to another carrier, the Southern Railroad. When the Big Four disposed of the car at Bindner's request by turning it over to the Southern, it delivered the car to Bindner just as much as if it had handed the car to him at the end of a derrick or crane. Disposition of the car pursuant to his request or instruction was delivery to him, and it can make no difference in what manner the car was turned over to the Southern. If the use by the Southern of the same waybill to carry the car out to the camp constituted a reconsignment, a change in destination, it was, as already stated, a reconsignment and change of destination at the request of Bindner—*the person in possession of the bill of lading*—and therefore a delivery to him. We have never before heard questioned the very simple rule that delivery of an article, to a person designated by the one entitled to delivery, is delivery to such a person. If a member of this Court should telephone the librarian at the Congressional Library and direct him to turn a certain book over to a designated messenger to be brought to the Supreme Court Chamber, his Honor would hardly have the temerity to claim that the Librarian had not delivered the book to him merely because the librarian, instead of bringing the book and handing it to his Honor personally, had turned it over to the messenger. De-

livery to a person's designated agent is always delivery to that person.

The shipper surely cannot complain about the disposition made of the car at the request of the person in possession of the bill, if, as the statute expressly provides (presumptively for the convenience of the shipper), an order bill endorsed in blank is negotiable by delivery. The shipper endorsing the bill in blank says to the carrier: "The person in possession of this bill of lading is entitled to the car. You may follow his instructions as to its disposition."

The Big Four had the car in its possession and control when it reached its destination, Louisville. The Big Four parted with its possession and control at Louisville upon the request of Bindner and Kelsey and upon their assurance that Bindner had the bill of lading (R. 59, 63). When it did so, it "delivered" the car to Bindner from the standpoint both of common sense, common justice and legal terminology, all of which should be synonymous.

As far as the shipper in the case is concerned, the situation surely is no different than if Bindner instead of telephoning had gone to the office of the Big Four, shown the Big Four the bill of lading then in his possession, requested delivery to him, which was made without requiring him to surrender the bill, and had then turned the car over to the Southern and arranged with that road to take it out to the camp. When the Big Four itself turned the car over to the Southern at Bindner's request, and with it the changed waybill which instructed the train crew to take the car to Dumesnil, Bindner was estopped from questioning the delivery to him, and certainly no one else could complain. The Big Four had the right to reconsign, reship, or do anything else with the car at the request of Bindner, who by virtue of his posses-



sion of the bill of lading controlled the car after it reached its destination at Louisville, just as much as if he had been the original shipper.

See Section 31 of the Statute, which reads in part as follows:

“Sec. 31.—A person to whom an order bill has been duly negotiated (an order bill after endorsement in blank is duly negotiated by delivery, see Secs. 27, 29) acquires thereby—

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully *as if the carrier had contracted directly with him.*”

After endorsing this bill of lading in blank and giving it circulation, the shipper no longer had a contract with the carrier. It was the Grand Rapids bank, and in turn, the Indianapolis bank, then Kelsey and then Bindner who had the contract with the carrier. Bindner, while he had possession of the bill, caused the carrier to deliver the car pursuant to his request, and no one but he could complain of a violation of the terms of the contract the carrier then had with him and with no one else.

Counsel for respondent in their brief filed in opposition to the Petition for Writ of Certiorari, say that “the only place at which the Big Four could lawfully do any act with reference to this car and properly discharge its duty was at Louisville, Kentucky, and at no other place”, and quote the language of this Court in *North Penn. Rd. vs. Commercial Bank*. 123 U. S. 727, as follows:

“Upon the evidence presented, and there was no conflict, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods entrusted to him, *but also to deliver them to the party designated by the terms of the shipment or to his order, at the place of destination.*”

Counsel also state that they have italicized the words

“at the place of destination,” “because that is the crucial point in this case which petitioner seems to have lost sight of altogether.”

The quotation referred to is good law, including the words “*to his order*,” which counsel for respondent chooses to pass without comment.

This bill of lading was endorsed *in blank* and delivery to a person in possession of the bill was, therefore, a delivery “*to his (the shipper’s) order*.” See Sections 27, 28, 30 and 31 of the Act. Delivery to Bindner was delivery *to the shipper’s order*, because the shipper by endorsing the bill of lading in blank thereby made it in effect “payable to bearer”—made it negotiable so that any person who acquired possession of it (rightfully or wrongfully) was entitled to a delivery of the car.

And delivery “at the place of destination” was made by the terminal carrier in this case. The destination was Louisville. The car reached its destination. After it did so, the terminal carrier, *at the direction of the person then in possession of the bill*, surrendered the car to the Southern Railroad at Louisville, and thereby made delivery *at Louisville*. As previously stated, Bindner’s possession of the bill of lading, whether rightful or wrongful, justified the terminal carrier in delivering the car to him, and any disposition made of it, *at his direction or request* was delivery to him. What was afterwards done with the car did not concern the Big Four, because it had delivered the car, in accordance with the contract represented by the negotiable order bill of lading endorsed in blank, to the person in possession of that bill. The only concern the Big Four then had was the liability it might incur to a person who might acquire the unsurrendered and uncanceled bill from Bindner without knowledge of the fact that the bill had already been used to obtain a

delivery of the car and was, therefore, a completed contract and of no further validity.

Counsel for respondent in their brief opposing the granting of a Writ of Certiorari make some comment about the conversation between Bindner and Smith, the agent of the Big Four, claiming that Bindner did not actually ask the Big Four to turn the car over to the Southern, but said something to Smith about sending it out to the camp at Dumesnil. Even if this be conceded, the situation remains unchanged. Irrespective of what Bindner said to Smith, it is undisputed that Kelsey's and Bindner's conduct and their assurance that Bindner had the bill of lading, led Smith to turn the car over to the Southern—to part with it and lose control of it. The Big Four does not run out to the camp at Dumesnil, and the only way a car can get out there from the City of Louisville proper is by turning it over to the Southern Railroad (R. 7). After the car arrived at destination, Louisville, the Big Four, upon the representation made by Bindner and by Kelsey, and in reliance upon their statements that Bindner had the bill of lading in his possession (which he did R. 7, 25, 26) released the car and delivered it to the Southern Railroad, which took it out to the camp where Bindner was located (R. 63, 64). This was precisely what both Bindner and Kelsey wanted done, and it was for no other purpose that they had talked with the Big Four, both assuring that road that Bindner had the bill of lading, and Kelsey paying the demurrage to release the car. It would not now lie in the mouth of either to say, and neither does say, that delivery was not made to Bindner at Louisville when the car was turned over to the Southern pursuant to representations they had made. And certainly the shipper cannot question the delivery which was made in reliance upon the possession by Bindner of the bill of lad-

ing which the shipper had endorsed in blank and given circulation.

### III.

#### *Failure to Take Up and Cancel Could Make Carrier Liable Only to Bona Fide Purchaser.*

When the Big Four delivered the car to Bindner, it did not take up and cancel the bill though the rules of the Big Four to its employes required it, and though there was a printed clause in the bill itself reading: "The surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property'.

Section 11 of the Uniform Bills of Lading Act as shown above provides in part that:

"If a carrier fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill."

The Michigan Court, by its decision, nullifies this and the other applicable provisions of the Uniform Bills of Lading Act, in holding that failure to take up and cancel the bill makes the carrier liable, *not only to a bona fide purchaser of the bill*, but to the original shipper who regains possession of the bill with notice or knowledge that it has already been used to obtain a delivery of the car. The Michigan Court seems to base its conclusion on a double hypothesis, viz.,

(1) As against the claim of the shipper himself, the act taken as a whole and in the light of previous decisions, cannot be construed to justify a delivery to a person in bare possession of the bill without requiring a surrender of the bill.

(2) The act is not to be construed as "prohibiting a contract requirement" that the surrender of the bill shall be required.

*Does the Act as a whole compel the Carrier to obtain a Surrender of the Bill on Delivery to a Person in Possession of the Bill?*

Under Section 8, a carrier is *bound* to deliver goods upon a demand made by the "holder" of the bill if the holder offers to *surrender the bill*, holder being defined by Section 42 of the Act as a "person who has both actual possession of such bill and a right of property therein."

Under Section 9,—

"A carrier is *justified, subject to the provisions of the three following sections*, in delivering goods to one who is—

(c) A person in possession of an order bill for the goods, \* \* \* which has been endorsed to him, or in blank by the consignee."

The "three following sections" are Sections 10, 11 and 12, the last having no application here and the two former reading as follows:

"Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods *if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section*; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or—

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting

with reasonable diligence, to stop delivery of the goods."

"Sec. 11.—Except as provided in section twenty-six, and except when compelled by legal process, *if a carrier delivers goods* for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and *fails to take up and cancel the bill*, such carrier shall be liable for failure to deliver the goods to *anyone who for value and in good faith purchases such bill*, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto."

If these sections, read together and in connection with the statute as a whole, do not mean what they say, that is, that the carrier is justified in making delivery to a person in possession of the bill of lading endorsed in blank by the consignee, and that, if such delivery is made and the carrier fails to take up and cancel the bill, the carrier shall be liable to a purchaser of the bill for value and in good faith, and to no one else, then what do they mean?

#### *Previous Decisions.*

There are no prior decisions, either state or federal, laying down any such doctrine as the Supreme Court of Michigan enunciates in the case at bar. The Michigan Court lays much stress upon four of its own previous decisions as being decisive of the case at bar, and says that the Federal Uniform Bills of Lading Act could never have been intended so to change the existing law as to make such decisions no longer controlling. The four cases are the following:

- Perkett vs. Railway Co., 175 Mich. 253.
- Turnbull vs. Railway Co., 183 Mich. 213.
- Thomas vs. Blair, 185 Mich. 422.
- Churchill vs. Railway Co., 188 Mich. 376.

We have never made, and do not now make, any claim that these decisions are erroneous or that they are in any way "emasculated" by the Uniform Bills of Lading Act. These cases all involved a delivery of the shipment to, or a diversion or change of routing at the request of, a person *not* in possession and who *never had* possession of the bill of lading endorsed in blank by the consignee. In not one of these cases, and in no case cited by the court or by counsel for the shipper, was there a delivery to or at the request of

"A person in possession of an order bill for the goods endorsed in blank by the consignee."

In *Perkett vs. Railway Co.*, 175 Mich. 253, the carrier diverted the shipment at the request of the consignee, who did *not*, however, have in his possession the bill of lading, the bill of lading *never having left the bank*, to which it was sent with the draft for collection, and it *never having been used by any person* who had possession of it to get the car. In the other three Michigan cases, the carrier in each instance delivered the shipment to a person who did *not* have, and never had had, possession of the bill of lading, the bill *never having left the bank* and never having been in the possession of any person to whom delivery was made *in reliance on such possession*.

The same is true of the case of *Georgia, etc., Ry. vs. Blish Milling Co.*, 241 U. S. 190, cited by counsel for respondent, the bill of lading in that case never having left the bank, and never having been *in the possession* of any person to whom delivery was made *in reliance upon such possession*.

No one questions the decisions of the Michigan Court in the four cases cited or the decision of this Court in the Blish case. They lay down precisely the same rule laid

down by Section 10 of the Uniform Bills of Lading Act which provides that:

"Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier *shall be liable* to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section."

Subdivision (c) of the preceding section is the one providing that a carrier is justified in making delivery to

"A person in possession of an order bill for the goods endorsed in blank by the consignee."

In the Michigan cases and in the Blish case, the carrier delivered the goods to a "person not lawfully entitled to the possession of them" so that the carrier was liable to the shipper because delivery was made "otherwise than as authorized by subdivisions (b) and (c), viz., delivery was made to a *person not in possession* of the bill of lading.

In the case at bar the carrier did deliver the goods as authorized by subdivision (c) of Section 9, viz., delivery was made to a *person in possession* of the bill of lading which was endorsed in blank, so that the carrier complied with the statute in making delivery, and became liable under Sections 9, 10 and 11 *only* to a purchaser for value and in good faith of the uncanceled bill.

The Supreme Court of Michigan seems to have gained the erroneous impression that our claim involves a construction of the Uniform Bills of Lading Act, which works a radical change in the law as recognized by the courts prior to its passage, and that our claim is not well founded because the court could not presume that Congress would intend such a radical change, a change which would nullify previous Michigan decisions, without so stating in explicit language. There are two very conclusive answers



to this proposition: First, the Act of Congress must be given effect without regard to prior decisions; and second, the act in any event makes no radical change in the existing law, and in no way emasculates the Michigan decisions upon which the Michigan Court lays so much stress as having settled the law.

The Uniform Bills of Lading Act either means what we claim it does, or it means nothing. Section 8 compels the carrier to make delivery to a *holder* of the bill upon his *surrender* of it. Section 9 just as clearly justifies the carrier in making delivery to a mere possessor of the bill, and the succeeding section (Sec. 11) expressly provides that if delivery is made without requiring a surrender and cancellation of the bill, *then* the carrier shall be liable to "anyone who for value and in good faith purchases such bill."

If this language means anything, it means what it says, and that is that the carrier shall be liable only to a person who in good faith and for value purchases the bill. By stating to whom the carrier shall be liable, the statute excludes all other liability, and surely excludes liability to the original shipper who reacquired the bill with knowledge of all the facts.

The Uniform Bill of Lading used in this case had been in use for a long time prior to the passage of the Uniform Bills of Lading Act, and had been approved by the Interstate Commerce Commission. When Congress passed the act, it must have had the form of the bill of lading then in use fully in mind. But whether Congress had it in mind or not, the statute was passed and must be given effect.

No one, however, has claimed or now claims that the statute makes a radical change in the previously existing law. The Supreme Court of the State of Michigan is in error when it says we claim that the statute makes a radical change. We have never made any such claim. In the

absence of the statute, our contention should still be sustained, and no court has ever sustained the contrary rule. None of the Michigan cases cited, and no other case cited either by counsel for respondent or by the court, sustains the contrary rule. No court has ever held that delivery to a person *in possession* of an order bill of lading endorsed in blank by the consignee made the carrier liable to the consignor, or to any other person except a purchaser in good faith and for value of the unsurrendered and uncanceled bill. In every one of its own decisions upon which the Michigan Court has laid so much stress, there was either a delivery to or a diversion or change of routing at the request of a person *not in possession* of the bill of lading. In none of the cases cited was there a delivery by the carrier to a person *in possession of an order bill for the goods endorsed in blank by the consignee*.

The Michigan Court has itself recognized the rule of the statute that failure to require a surrender and cancellation of the bill makes the carrier liable only to a bona fide holder, by saying in *Turnbull vs. Michigan Central*, one of the four cases cited:

"It is true that *prima facie* the consignee is the owner of the goods shipped, but it is equally true, and the rule is well established, that when there is an order bill of lading outstanding, the carrier delivering the goods, without requiring the presentation of the bill does so at its peril and is liable to the bona fide holder thereof."

We have found no case in the books, nor has our attention been directed to any by either the Michigan Court or by counsel, in which it has been held that the carrier who makes delivery of the shipment to a person in possession of the bill endorsed in blank is liable to anyone *except* a bona fide holder of the bill.

The only decision we have been able to find involving facts similar to those in the case at bar is that of *Famous*

*Mfg. Co. vs. Railroad*, 166 Iowa, 361, 147 N. W. 754, decided in 1914, which we called to the attention of the Supreme Court of Michigan, but which that court ignores in its opinion. The material facts of that case are identical with the material facts in the case at bar, and the conclusion of the Supreme Court of Iowa on the question involved in this case is in entire accord with what the Uniform Bills of Lading Act now establishes as the law, and in entire accord with our contention in the case at bar. The facts in the Iowa case were these:

Plaintiff company shipped a power press consigned to the order of itself and bill of lading was issued accordingly. The waybill was endorsed, "Notify C. J. Bugbee". Plaintiff sent the bill of lading endorsed in blank to a bank with instructions to make settlement with Bugbee for the purchase price before giving up the bill of lading. The press arrived at destination. The bank called the railroad office by telephone, advised the agent that it had the bill of lading, and directed him to deliver the shipment to Bugbee. The shipment was delivered to Bugbee. No surrender of the bill of lading was required. Bugbee later returned the press to the railroad company and refused to pay for it. The shipper sued the railroad company. The shipper claimed that the bank had no authority to direct a delivery of the property to Bugbee; that the railroad company was bound to ascertain the extent of the bank's authority; and that the railroad's delivery of the property to Bugbee without an actual surrender of the bill of lading was unauthorized and rendered it liable for conversion of the goods.

The Supreme Court of Iowa held:

(1) That by delivering to the bank the bill of lading duly endorsed, the shipper clothed the bank with the apparent legal title to the property and with the undoubted right to obtain delivery from the railroad company; and that

(2) The delivery to Bugbee, at the direction of the bank, was, in legal effect, a delivery to the bank—not a delivery to Bugbee, the notify party; and that

(3) The fact that the railroad company failed to require a surrender of the bill of lading cast upon it only "the burden of proving that the person to whom or upon whose direction it delivered the property was in fact the holder of the bill of lading at such time."

The shipper in the case at bar shipped the car of potatoes to itself as consignee, and a bill of lading was issued accordingly. The shipper turned the bill duly endorsed in blank over to the Grand Rapids bank, which forwarded it to the Indianapolis bank for collection. The Indianapolis bank turned the bill of lading over to Kelsey without requiring payment of the draft, and he turned it over to Bindner. The car arrived at destination. Bindner called the Big Four by telephone, advised its agent that he had the bill of lading, and directed him to deliver the car to the Southern. The car was delivered to the Southern. The surrender of the bill of lading was not required. The shipper claims that Bindner had no authority to direct a delivery to the Southern Railroad, that the Big Four was bound to ascertain the extent of Bindner's authority, and that the Big Four's delivery of the car without an actual surrender of the bill of lading was unauthorized and rendered it liable for conversion of the car.

The material facts in the two cases are identical. The claims of the respective shippers are identical. The holdings should be identical, even in the absence of the Uniform Bills of Lading Act. But that act, in the absence or in the face of any decision or decisions, lays down the rights and liabilities of the parties to this suit in language so clear and so simple that "he who runs may read."

*Does the Act Prohibit a Contract Requirement that the Surrender of the Bill shall be required before Delivery of*

*the Shipment, and if not, what is the result of a Breach of such Requirement?*

The order bill of lading used in this transaction is the usual form which had been approved by the Interstate Commerce Commission in 1908 and which was in universal use at the time the Uniform Bills of Lading Act was passed in 1916. That is, order bills of lading prior to the passage of the act, as well as since, have had printed on their face the clause, "the surrender of this original order bill of lading properly endorsed shall be required before the delivery of the property."

If the Uniform Bills of Lading Act does not apply to and does not govern order bills of lading containing *such a clause*, it applies to and governs nothing. It either governs such bills of lading or it governs no order bills of lading at all, because there were and are no other order bills of lading in use.

Let us assume, however, as did the Michigan Court, that the Uniform Bills of Lading Act is not "to be construed as prohibitive of a contract requirement in the order bill of lading issued by the carrier to that effect", so that Section 11 limiting liability in case of failure to take up and cancel a bill to a bona fide holder does not apply to this case. Does it follow that the carrier then becomes liable? The Supreme Court of Michigan, without pointing out how or why the carrier becomes liable, assumed that it was and rendered judgment against petitioner (R. 113).

For the damage, if any, resulting from the failure to take up and cancel the bill, the carrier can be liable only to the person damaged, and this follows whether the wrong is in violation of the contract created by the bill of lading or in violation of the Uniform Bills of Lading Act.

As previously shown, the terminal carrier made a lawful delivery of the car because it made delivery to a person in possession of the bill of lading endorsed in blank by the consignee—it made delivery to a person clothed by the shipper himself with authority to receive the shipment, the endorsement in blank making the instrument in effect payable to bearer. The failure to take up and cancel the bill was therefore the carrier's only breach of duty or of contract, but this breach of duty or of contract resulted in no damage to the shipper or to anyone else.

All of the damage sustained by the shipper in this case arose through the wrongful act of the Indianapolis bank in turning the bill over to Mr. Kelsey without requiring payment of the draft. Through and as a direct consequence of that act, Bindner through his possession of the bill was able to obtain a delivery of the car from the Big Four and have it taken out to the camp, where it remained after rejection of the potatoes by the government under Kelsey's contract until the potatoes became damaged through freezing in zero weather. The fact that the Big Four did not take up and cancel the bill had absolutely nothing to do with the damage to the potatoes, or the resulting damage to the shipper, who finally took possession of them, reshipped them and sold them at a large loss.

But the shipper claims that the carrier's failure to take up and cancel the bill enabled Bindner to give it back to Kelsey, and he to the bank, so that the bank was in position to tender it back to the shipper when the latter demanded his money on the draft.

We are utterly unable to see how the fact that the bank got the bill of lading back injured the shipper in any way. The shipper's right of action against *his agent*, the Indianapolis bank, accrued when the bank violated its duty by parting with the bill of lading without requiring payment

of the draft, which act resulted in a delivery of the car to Bindner, its movement to the camp and the consequent loss sustained through freezing while at the camp. The fact that the bank later regained possession of the bill, after Bindner, in the meantime, had obtained delivery of the car by virtue of his possession of the bill and after the damage was all done, and was able to tender it back to the shipper, who accepted its return under protest with knowledge of all the facts, could not affect the right of action accrued against the bank. The bank could not place itself in *status quo* for the simple reason that the bill of lading, while it was out of the hands of the bank, had been used to effect a delivery of the car. When it came back to the Indianapolis bank it was, as far as the bank and the shipper were concerned, a "cancelled" bill, because the car which it originally represented had been delivered. To the shipper or to anyone else, a bill which he knows has been used to obtain a delivery of the car is a "cancelled bill" just as much as if it had the word "cancelled" stamped across its face.

There could be no question about petitioner's liability in this case if the Indianapolis bank, after having the uncanceled bill returned to it, had sold it to a purchaser in good faith and for value. Such a purchaser would have been protected under Section 11 of the Uniform Bills of Lading Act and under the law prior to the passage of the act as a bona fide purchaser. Such a purchaser is the only one who could be harmed by a failure to take up and cancel the bill, because he would give value for it without knowing that it had already been used to obtain a delivery of the car and in reliance upon what it purported to be on its face—a live contract representing a car of potatoes in the hands of the carrier issuing the bill. The bank did not sell the bill to a bona fide purchaser, but

returned it to the shipper who accepted its return under protest with knowledge of all the facts.

The shipper surely stands in no better position than would the Indianapolis bank from whom he accepted the return of the bill under protest and with knowledge of all the facts. Yet, no one would seriously claim that the bank could have recovered from the carrier because the carrier failed to require a surrender and cancellation of the bill. The carrier, in legal effect, delivered the car to the bank by disposing of it as requested by Bindner, the bank's assignee of the bill by delivery. The bank could not turn around after such delivery and say to the carrier: "It is true that you delivered the car to me and I took it out to the camp and let the potatoes freeze, but when you delivered it to me, you did not compel me to surrender the bill as required on its face, and therefore committed a breach of contract in that respect. You did not compel me to surrender it, as the bill required. I did not insist that you take it up, as the bill required, and as I now insist you should have done. Neither of us insisted upon a compliance with that clause of the bill. Both of us waived it. The only result is that I and not you now have the bill. Yet, I ask you to pay me the value of the potatoes which you delivered to me and you must pay because you did not require me to surrender the bill."

### CONCLUSION.

The Uniform Bills of Lading Act was most carefully and skillfully drawn to accomplish two things, namely, the negotiability of bills of lading by endorsement and by delivery so that they would provide a convenient method of transferring title to property in the hands of carriers, and protection of all parties concerned insofar as it is legally possible where a negotiable instrument is involved. The statute fully accomplishes the purpose in-



tended. As applied to the facts in this case, it protects the rights of all parties. The shipper is protected because delivery has been made to the person who had the bill of lading—to his assignee by delivery—and if such person or his transferor obtained it from the bank without being required to pay the draft, then the bank is responsible to the shipper. The shipper cannot impose liability on the carrier merely because the shipper's own agent, the bank, violated its duty by parting with the bill without requiring payment of the draft. The carrier is protected as against the shipper because it made delivery to a person in possession of the bill—a person to whom the shipper expressly authorized delivery by endorsing the bill of lading in blank and giving it circulation. Innocent third parties are protected because if they buy the unsurrendered and uncanceled bill in good faith and for value, the carrier is liable to them on the bill notwithstanding delivery was made to the person in possession of it.

We respectfully submit that the decision of the Supreme Court of Michigan is clearly erroneous, that it in effect nullifies the most important and controlling portions of the Federal Uniform Bills of Lading Act, and that it should be reversed.

OSCAR E. WAER,  
JOHN C. SHIELDS,  
Counsel for Petitioner.



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APPENDIX

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Uniform Bills of Lading Act

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## APPENDIX.

## Uniform Bills of Lading Act.

(Act Aug. 29, 1916, c. 415; 39 Stats. at Large 538.)

Section 1.—Bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or from a place in one State to a place in the same State through another State or foreign country, shall be governed by this Act.

Sec. 2.—A bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.

Sec. 3.—A bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill. Any provision in such a bill or in any notice, contract, rule, regulation or tariff that it is nonnegotiable shall be null and void and shall not affect its negotiability within the meaning of this Act unless upon its face and in writing agreed to by the shipper.

Sec. 4.—Order bills issued in a State for the transportation of goods to any place in the United States on the Continent of North America, except Alaska and Panama, shall not be issued in parts or sets. If so issued, the carrier issuing them shall be liable for failure to deliver the goods described therein to anyone who purchases a part for value in good faith, even though the purchase be after the delivery of the goods by the carrier to a holder of one of the other parts: Provided, however, That nothing contained in this section shall be interpreted or construed to forbid the issuing of order bills in parts or sets for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries, or to impose the liabilities set forth in this section for so doing.

Sec. 5.—When more than one order bill is issued in a State for the same goods to be transported to any place in the United States on the Continent of North America,

except Alaska and Panama, the word "duplicate," or some other word or words indicating that the document is not an original bill, shall be placed plainly upon the face of every bill except the one first issued. A carrier shall be liable for the damage caused by his failure so to do to anyone who has purchased the bill for value in good faith as an original, even though the purchase be after the delivery of the goods by the carrier to the holder of the original bill: Provided, however, That nothing contained in this section shall in such case for such transportation of goods to Alaska, Panama, Porto Rico, the Philippines, Hawaii, or foreign countries be interpreted or construed so as to require the placing of the word "duplicate" thereon, or to impose the liabilities set forth in this section for failure so to do.

Sec. 6.—A straight bill shall have placed plainly upon its face by the carrier issuing it "nonnegotiable" or "not negotiable."

This section shall not apply, however, to memoranda or acknowledgements of an informal character.

Sec. 7.—The insertion in an order bill of the name of a person to be notified of the arrival of the goods shall not limit the negotiability of the bill or constitute notice to a purchaser thereof of any rights or equities of such person in the goods.

Sec. 8.—A carrier, in the absence of some lawful excuse, is bound to deliver goods upon a demand made either by the consignee named in the bill for the goods or, if the bill is an order bill, by the holder thereof, if such a demand is accompanied by—

(a) An offer in good faith to satisfy the carrier's lawful lien upon the goods;

(b) Possession of the bill of lading and an offer in good faith to surrender, properly indorsed, the bill which was issued for the goods, if the bill is an order bill; and

(c) A readiness and willingness to sign, when the goods are delivered, an acknowledgment that they have been delivered, if such signature is requested by the carrier.

In case the carrier refuses or fails to deliver the goods, in compliance with a demand by the consignee or holder so accompanied, the burden shall be upon the carrier to establish the existence of a lawful excuse for such refusal or failure.

Sec. 9.—A carrier is justified, subject to the provisions of the three following sections, in delivering goods to one who is—

(a) A person lawfully entitled to the possession of the goods, or

(b) The consignee named in a straight bill for the goods, or

(c) A person in possession of an order bill for the goods, by the terms of which the goods are deliverable to his order; or which has been indorsed to him, or in blank by the consignee, or by the mediate or immediate indorsee of the consignee.

Sec. 10.—Where a carrier delivers goods to one who is not lawfully entitled to the possession of them, the carrier shall be liable to anyone having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section; and, though he delivered the goods as authorized by either of said subdivisions, he shall be so liable if prior to such delivery he—

(a) Had been requested, by or on behalf of a person having a right of property or possession in the goods, not to make such delivery, or

(b) Had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.

Such request or information, to be effective within the meaning of this section, must be given to an officer or agent of the carrier, the actual or apparent scope of whose duties include action upon such a request or information, and must be given in time to enable the officer or agent to whom it is given, acting with reasonable diligence, to stop delivery of the goods.

Sec. 11.—Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods, and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill, whether such purchaser acquired title to the bill before or after the delivery of the goods by the carrier and notwithstanding delivery was made to the person entitled thereto.

Sec. 12.—Except as provided in section twenty-six, and except when compelled by legal process, if a carrier delivers part of the goods for which an order bill had been issued and fails either—

(a) To take up and cancel the bill, or

(b) To place plainly upon it a statement that a portion of the goods has been delivered with a description which may be in general terms either of the goods or packages that have been so delivered or of the goods or packages which still remain in the carrier's possession, he shall be liable for failure to deliver all the goods specified in the bill to anyone who for value and in good faith purchases it, whether such purchaser acquired title to it before or after the delivery of any portion of the goods by the carrier, and notwithstanding such delivery was made to the person entitled thereto.

Sec. 13.—Any alteration, addition, or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor.

Sec. 14.—Where an order bill has been lost, stolen, or destroyed a court of competent jurisdiction may order the delivery of the goods upon satisfactory proof of such loss, theft, or destruction and upon the giving of a bond, with sufficient surety, to be approved by the court, to protect the carrier or any person injured by such delivery from any liability or loss incurred by reason of the original bill remaining outstanding. The court may also in its discretion order the payment of the carrier's reasonable costs and counsel fees: Provided, a voluntary indemnifying bond without order of court shall be binding on the parties thereto.

The delivery of the goods under an order of the court, as provided in this section, shall not relieve the carrier from liability to a person to whom the order bill has been or shall be negotiated for value without notice of the proceedings or of the delivery of the goods.

Sec. 15.—A bill, upon the face of which the word "duplicate" or some other word or words indicating that the document is not an original bill is placed, plainly shall impose upon the carrier issuing the same the liability of one who represents and warrants that such bill is an ac-



curate copy of an original bill properly issued, but no other liability.

Sec. 16.—No title to goods or right to their possession asserted by a carrier for his own benefit shall excuse him from liability for refusing to deliver the goods according to the terms of a bill issued for them, unless such title or right is derived directly or indirectly from a transfer made by the consignor or consignee after the shipment, or from the carrier's lien.

Sec. 17.—If more than one person claim the title or possession of goods, the carrier may require all known claimants to interplead, either as a defense to an action brought against him for nondelivery of the goods or as an original suit, whichever is appropriate.

Sec. 18.—If some one other than the consignee or the person in possession of the bill has a claim to the title or possession of the goods, and the carrier has information of such claim, the carrier shall be excused from liability for refusing to deliver the goods, either to the consignee or person in possession of the bill or to the adverse claimant, until the carrier has had a reasonable time to ascertain the validity of the adverse claim or to bring legal proceedings to compel all claimants to interplead.

Sec. 19.—Except as provided in the two preceding sections and in section nine, no right or title of a third person, unless enforced by legal process, shall be a defense to an action brought by the consignee of a straight bill or by the holder of an order bill against the carrier for failure to deliver the goods on demand.

Sec. 20.—When goods are loaded by a carrier such carrier shall count the packages of goods, if package freight, and ascertain the kind and quantity if bulk freight, and such carrier shall not, in such cases, insert in the bill of lading or in any notice, receipt, contract, rule, regulation, or tariff, "Shipper's weight, load, and count," or other words of like purport, indicating that the goods were loaded by the shipper and the description of them made by him or in case of bulk freight and freight not concealed by packages the description made by him. If so inserted, contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 21.—When package freight or bulk freight is

loaded by a shipper and the goods are described in a bill of lading merely by a statement of marks or labels upon them or upon packages containing them, or by a statement that the goods are said to be goods of a certain kind or quantity, or in a certain condition, or it is stated in the bill of lading that packages are said to contain goods of a certain kind or quantity or in a certain condition, or that the contents or condition of the contents of packages are unknown, or words of like purport are contained in the bill of lading, such statements, if true, shall not make liable the carrier issuing the bill of lading, although the goods are not of the kind or quantity or in the condition which the marks or labels upon them indicate, or of the kind or quantity or in the condition they were said to be by the consignor. The carrier may also by inserting in the bill of lading the words "Shipper's weight, load, and count," or other words of like purport indicate that the goods were loaded by the shipper and the description of them made by him; and if such statement be true, the carrier shall not be liable for damages caused by the improper loading or by the nonreceipt or by the misdescription of the goods described in the bill of lading: Provided, however, Where the shipper of bulk freight installs and maintains adequate facilities for weighing such freight, and the same are available to the carrier, then the carrier, upon written request of such shipper and when given a reasonable opportunity so to do, shall ascertain the kind and quantity of bulk freight within a reasonable time after such written request, and the carriers shall not in such cases insert in the bills of lading the words "Shipper's weight," or other words of like purport, and if so inserted contrary to the provisions of this section, said words shall be treated as null and void and as if not inserted therein.

Sec. 22.—If a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several States and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused

by the nonreceipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue.

Sec. 23.—If goods are delivered to a carrier by the owner or by a person whose act in conveying the title to them to a purchaser for value in good faith would bind the owner, and an order bill is issued for them, they can not thereafter, while in the possession of the carrier, be attached by garnishment or otherwise or be levied upon under an execution unless the bill be first surrendered to the carrier or its negotiation enjoined. The carrier shall in no such case be compelled to deliver the actual possession of the goods until the bill is surrendered to him or impounded by the court.

Sec. 24.—A creditor whose debtor is the owner of an order bill shall be entitled to such aid from courts of appropriate jurisdiction by injunction and otherwise in attaching such bill or in satisfying the claim by means thereof as is allowed at law or in equity in regard to property which can not readily be attached or levied upon by ordinary legal process.

Sec. 25.—If an order bill is issued the carrier shall have a lien on the goods therein mentioned for all charges on those goods for freight, storage, demurrage and terminal charges, and expenses necessary for the preservation of the goods or incident to their transportation subsequent to the date of the bill and all other charges incurred in transportation and delivery, unless the bill expressly enumerates other charges for which a lien is claimed. In such case there shall also be a lien for the charges enumerated so far as they are allowed by law and the contract between the consignor and the carrier.

Sec. 26.—After goods have been lawfully sold to satisfy a carrier's lien, or because they have not been claimed, or because they are perishable or hazardous, the carrier shall not thereafter be liable for failure to deliver the goods themselves to the consignee or owner of the goods, or to a holder of the bill given for the goods when they were shipped, even if such bill be an order bill.

Sec. 27.—An order bill may be negotiated by delivery where, by the terms of the bill, the carrier undertakes to deliver the goods to the order of a specified person, and such person or a subsequent indorsee of the bill has indorsed it in blank.

Sec. 28.—An order bill may be negotiated by the indorsement of the person to whose order the goods are deliverable by the tenor of the bill. Such indorsement may be in blank or to a specified person. If indorsed to a specified person, it may be negotiated again by the indorsement of such person in blank or to another specified person. Subsequent negotiation may be made in like manner.

Sec. 29.—A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby. A straight bill can not be negotiated free from existing equities, and the indorsement of such a bill gives the transferee no additional right.

Sec. 30.—An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired, if by the terms of the bill the carrier undertakes to deliver the goods to the order of such person, or if at the time of negotiation the bill is in such form that it may be negotiated by delivery.

Sec. 31.—A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him.

Sec. 32.—A person to whom a bill has been transferred, but not negotiated, acquires thereby as against the transferor the title to the goods, subject to the terms of any agreement with the transferor. If the bill is a straight bill such person also acquires the right to notify the carrier of the transfer to him of such bill and thereby to become the direct obligee of whatever obligations the carrier owed to the transferor of the bill immediately before the notification.

Prior to the notification of the carrier by the transferor or transferee of a straight bill the title of the transferee to the goods and the right to acquire the obligation of the carrier may be defeated by garnishment or by attachment

or execution upon the goods by a creditor of the transferor, or by a notification to the carrier by the transferor or a subsequent purchaser from the transferor of a subsequent sale of the goods by the transferor.

A carrier has not received notification within the meaning of this section unless an officer or agent of the carrier, the actual or apparent scope of whose duties includes action upon such a notification, has been notified; and no notification shall be effective until the officer or agent to whom it is given has had time, with the exercise of reasonable diligence, to communicate with the agent or agents having actual possession or control of the goods.

Sec. 33.—Where an order bill is transferred for value by delivery, and the indorsement of the transferor is essential for negotiation, the transferee acquires a right against the transferor to compel him to indorse the bill, unless a contrary intention appears. The negotiations shall take effect as of the time when the indorsement is actually made. This obligation may be specifically enforced.

Sec. 34.—A person who negotiates or transfers for value a bill by indorsement or delivery, unless a contrary intention appears, warrants—

- (a) That the bill is genuine;
- (b) That he has a legal right to transfer it;
- (c) That he has knowledge of no fact which would impair the validity or worth of the bill;
- (d) That he has a right to transfer the title to the goods, and that the goods are merchantable or fit for a particular purpose whenever such warranties would have been implied if the contract of the parties had been to transfer without a bill the goods represented thereby.

Sec. 35.—The indorsement of a bill shall not make the indorser liable for any failure on the part of the carrier or previous indorsers of the bill to fulfill their respective obligations.

Sec. 36.—A mortgagee or pledgee or other holder of a bill for security who in good faith demands or receives payment of the debt for which such bill is security, whether from a party to a draft drawn for such debt or from any other person, shall not be deemed by so doing to represent or warrant the genuineness of such bill or the quantity or quality of the goods therein described.

Sec. 37.—The validity of the negotiation of a bill is not impaired by the fact that such negotiation was a breach of duty on the part of the person making the negotiation, or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated, or a person to whom the bill was subsequently negotiated, gave value therefor in good faith, without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft, or conversion.

Sec. 38.—Where a person, having sold, mortgaged, or pledged goods which are in a carrier's possession and for which an order bill has been issued, or having sold, mortgaged, or pledged the order bill representing such goods, continues in possession of the order bill, the subsequent negotiation thereof by that person under any sale, pledge, or other disposition thereof to any person receiving the same in good faith, for value and without notice of the previous sale, shall have the same effect as if the first purchaser of the goods or bill had expressly authorized the subsequent negotiation.

Sec. 39.—Where an order bill has been issued for goods no seller's lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller's claim to a lien or right of stoppage in transitu. Nor shall the carrier be obliged to deliver or justified in delivering the goods to an unpaid seller unless such bill is first surrendered for cancellation.

Sec. 40.—Except as provided in section thirty-nine, nothing in this Act shall limit the rights and remedies of a mortgagee or lien holder whose mortgage or lien on goods would be valid, apart from this Act, as against one who for value and in good faith purchased from the owner, immediately prior to the time of their delivery to the carrier, the goods which are subject to the mortgage or lien and obtained possession of them.

Sec. 41.—Any person who, knowingly or with intent to defraud, falsely makes, alters, forges, counterfeits, prints or photographs any bill of lading purporting to represent goods received for shipment among the several States or

with foreign nations, or with like intent utters or publishes as true and genuine any such falsely altered, forged, counterfeited, falsely printed or photographed bill of lading, knowing it to be falsely altered, forged, counterfeited, falsely printed or photographed, or aids in making, altering, forging, counterfeiting, printing or photographing, or uttering or publishing the same, or issues or aids in issuing or procuring the issue of, or negotiates or transfers for value a bill which contains a false statement as to the receipt of the goods, or as to any other matter, or who, with intent to defraud, violate, or fails to comply with, or aids in any violation of, or failure to comply with any provision of this Act, shall be guilty of a misdemeanor, and, upon conviction, shall be punished for each offense by imprisonment not exceeding five years, or by a fine not exceeding \$5,000, or both.

Sec. 42.—First. That in this Act, unless the context of subject matter otherwise requires—

“Action” includes counterclaim, set-off, and suit in equity.

“Bill” means bill of lading governed by this Act.

“Consignee” means the person named in the bill as the person to whom delivery of the goods is to be made.

“Consignor” means the person named in the bill as the person from whom the goods have been received for shipment.

“Goods” means merchandise or chattels in course of transportation or which have been or are about to be transported.

“Holder” of a bill means a person who has both actual possession of such bill and a right of property therein.

“Order” means an order by indorsement on the bill.

“Person” includes a corporation or partnership, or two or more persons having a joint or common interest.

To “purchase” includes to take as mortgagee and to take as pledgee.

“State” includes any Territory, District, insular possession, or isthmian possession.

Sec. 43.—The provisions of this Act do not apply to bills made and delivered prior to the taking effect thereof.

Sec. 44.—The provisions and each part thereof and the sections and each part thereof of this Act are independent and severable, and the declaring of any provision or part

thereof, or provisions or part thereof, or section or part thereof, or sections or part thereof, unconstitutional shall not impair or render unconstitutional any other provision or part thereof or section or part thereof.

Sec. 45.—This Act shall take effect and be in force on and after the first day of January next after its passage.



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# Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 369.

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PERE MARQUETTE RAIL-  
WAY COMPANY,

*Petitioner,*

vs.

J. F. FRENCH & COMPANY.

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## **BRIEF FOR RESPONDENT.**

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### STATEMENT OF FACTS.

The appellant's statement of facts as set forth in its brief is incorrect and incomplete in the following particulars.

In the very first paragraph the unqualified statement is made that this case arises under the Federal Uniform Bills of Lading Act passed in 1916. (Act of August 29th, 1916, Ch. 415, 39 Stat. at Large 539.) We take exception to this statement. It is our opinion that the common law rules applicable to carriers control the issues in this case. We believe that the Court will find it necessary to look outside of the Act itself for the fundamental propositions of law upon which to base a decision.

This action is brought to recover the loss sustained on the potatoes loaded in N. Y. C. car No. 151473, shipped from Bailey, Michigan, on November 3rd, 1917, to the order of J. F. French & Company; destination Louisville, State of Kentucky; notify Marshall & Kelsey, c/o Captain Bernard, Commissary at Camp Zachary Taylor, State of Kentucky; route C. C. C. & St. L. The car contained 45,000 pounds of potatoes which had been sold before shipment to Marshall and Kelsey at \$2.63 per hundred, less the freight rate from Bailey to Indianapolis, the net amount due the plaintiff being \$1,086.75. The salvage of the car upon the resale was \$411.55. Plaintiff recovered a judgment for \$689.20, being the amount of its claim with interest. (R. 16, 54 and Exhibit "B" inside the back cover of record.)

Right after the words "out to the camp" in the fourteenth line from the bottom on page 3 of the statement of facts as presented by counsel for defendant, the following information ought to be included: "A through freight rate could not be obtained from Bailey to Dumesnil. The Southern charged a six-cent local or arbitrary rate for transporting goods from Louisville to Dumesnil." (R. 21.)

In the second paragraph on page 4 of brief of counsel for defendant it is stated that the plaintiff deposited both the draft and endorsed bill of lading with its bank at Grand Rapids, Michigan, for collection. This is entirely incorrect. The plaintiff sold the draft with bill of lading attached to the Grand Rapids Savings Bank, receiving therefor the face value, which was paid by crediting that sum to the commercial account of plaintiff. (R. 18.) On this same page (page 4) counsel for defendant also states that Mr. Kelsey took the bill of lading endorsed in blank to Camp Taylor and turned it over to one James Bindner. Inasmuch as the entire defense is based on this transaction, and the facts and circumstances

attending it, the exact situation should be stated. Binder testified as follows:

"I would say I saw the original bill of lading about November 12th or 13th, 1917. Mr. Kelsey turned the bill of lading over to me. (R. 44.)

Cross examination:

Kelsey gave me this bill and others at the same time. He had several bills of lading, five or six different times, sometimes one, two, three, and he came in the office and asked me—he had a whole lot of stuff in his pockets, and I reckon he knew the value of order notify bill of lading and so he asked me to keep them for him, and so I did; I took them and chucked them in a drawer.

Q. And that is the way you held them all this time?

A. Yes, sir.

Q. And they were in your charge all the time?

A. I was holding them for him.

The Court: Weren't you holding them for the Southern Railroad?

A. No, sir. (R. 48.)

Q. Now, as I understand you, when you got this bill of lading you held it for Mr. Kelsey at his request?

A. Yes, sir. (R. 49.)

Q. Well, at the time you called the Big Four, you held that bill of lading from Mr. Kelsey?

A. Yes.

Q. And you always held it for Mr. Kelsey?

A. Yes.

Q. And when you delivered it back you delivered it to Mr. Kelsey?

A. Yes, sir.

Q. And for no other purpose?

A. For no other purpose.

Q. And you did not hold it at any time in your capacity as an agent or employe of the Southern Railway?

A. I did not, no sir." (R. 49.)

In the last line on page 4 counsel for defendant states

that the agent of the Big Four at the direction and request of Mr. Bindner delivered the car to the Southern Railroad for transportation to the camp. The following paragraph on page 5 also contains many other statements unsupported by the record. The testimony is so clear that the better way to do is to set forth the words of the witnesses as to what happened in this regard. Mr. Bindner testified on direct examination:

"I knew that Mr. Smith was the car clerk of the Big Four at Louisville. On November 16th I called him on the 'phone and talked with him. (R. 45.) I told Mr. Smith to let the car come on out, that I held the bill of lading. I actually had it at that time in my office. The records show that the car arrived on the 18th of November at nine A. M. I did not say anything else to Mr. Smith with reference to this bill of lading, except that I had it. I did not say anything to Smith about what Kelsey had told me with reference to this bill of lading in my office the day the car arrived there. (R. 46.)

(Cross examination:

Kelsey did not tell me to tell the Big Four that I had the bill of lading. I did that on my own hook. The car was overdue and I looked at the routing on the bill of lading and it was routed Big Four and I called Mr. Smith.

Q. As long as you had it what difference did it make?

A. It would make a whole lot of difference when the government needed the potatoes.

Q. Well, had the government told you that they needed the potatoes?

A. They always need them.

Q. Well, then you were acting in rather the capacity of kind of helping the thing along to get the car out there. You knew the government needed potatoes?

A. Yes.

Q. And you just wanted to let them know as a matter of information that you held the bill of lading?

A. That I held the bill of lading so that the car would not be delayed.

Q. And that you held it for Mr. Kelsey?

A. No.

Q. Well, you didn't tell him the entire facts?

A. I told him I had the bill of lading; that is all.

Q. Well, you were talking then in your personal capacity, or as agent?

A. Not as agent; I was not agent.

Q. Well, as cashier?

A. Yes, sir.

The Court: Well, wait a minute. I don't understand that. Were you talking as cashier of the Southern Railroad when you notified the Big Four?

A. Yes, sir.

Q. You didn't hold the bills as cashier — you didn't hold this bill of lading as cashier?

A. I know I didn't. (R. 49-50.)

Q. And when you called up you simply acted of your own volition, knowing that the government wanted the potatoes and you thought they might be in the car?

A. Yes, sir." (R. 51.)

Witness John T. Smith, trackage clerk for the Big Four Railroad at Louisville, testified on direct examination as follows:

"The records show that the car arrived at Louisville at 6:35 A. M. November 9th, 1917. About the 14th of November Mr. Bindner of the Southern called me up. He said, 'I have the bill of lading on that car and why don't you send it out?' I told him I would providing he would—or the Southern Railway would—guarantee me our car service and that he had the bill of lading. He did not say anything prior to the time I sent the car out about any arrangement he had with Mr. Kelsey about the bills of lading.

Cross examination:

It was the rule of my employer that I should not deliver the shipment described in this waybill, without the surrender of the bill of lading, and I knew under the strict interpretation of the rules given me by my employer that I had no right to let this car to Dumesnil without the surrender of the original bill of lading.

Q. And when you understood from Mr. Bindner that he had the bill of lading, you took a chance?

A. I took a chance on his word that he had the bill of lading and on Mr. Kelsey's word that he surrendered the bill of lading to Mr. Bindner, for the simple reason that he paid the demurrage charge for the release of the car to let me send the car to Dumesnil.

Q. Well, now, did you ever receive this original order bill?

A. No, sir.

Q. In the hands of the Southern?

A. No, sir.

Q. Did you ever demand it from them?

A. No, sir; Mr. Bindner told me he had it, I ordered the heading of the billing changed, and all the charges to follow outside of demurrage to the Southern Railway. I sent the car to the agent or his cashier, his attendant, at Dumesnil. (R. 62-63.)

Q. Yes, you have never seen it?

A. I never saw it.

Q. You never saw it in his possession?

A. From the evidence it is proved that it was already in his office at the time the car was there.

Q. I am talking about you personally.

A. Personally, I never saw the bill of lading.

Q. You don't know when he got it, don't know when he gave it back?

A. I don't know when he got it or when he gave it back. All I know he had it, told me he had it when I released the car." (R. 64-65.)

After the first paragraph on page 4 the following should be added:

"Recross examination of Mr. Bindner:

Q. I will ask you if this car, moving under this billing was not still consigned to the order of J. F. French and Company?

A. Yes.

Q. And not to you?

A. Not to me.

Q. Or did not move directly to you, either in your capacity as agent or in your personal capacity?

A. No, sir." (R. 54.)



On page 5 right after line 23 of brief of counsel for defendant a correction ought to be made in order that the implied contention that the car of potatoes in question was rejected by the government, can be eradicated. This is also necessary in order to refute the statements found in lines 29 and 30 to the effect that the car in question was not sorted and was entirely refused by the government on November 28th. It ought to be added that the true situation was that some cars were reported rejected by the Commissary Department, but Lieutenant Coloner Pierson, the Camp Quartermaster at Camp Taylor, produced his records showing notification of the cars of potatoes which were in trouble, but his records did not show that the car in question had been rejected, nor was there any evidence of any kind of the part of the defendant that the car was rejected. (R. 80.)

Plaintiff introduced evidence to the effect that its agent examined this car while he was at the camp, and that he could tell from the way the sacks were wedged together, which is natural after having been transported, that no sacks had been taken out of the car before he looked at it, and that no inspection, upon which a rejection could be based, had been made. (R. 86.)

It is true that some of the cars were reported rejected by the government officials, but events proved that the rejection had not been justified. Furthermore the government specifications allowed a shrinkage of 3 per cent in weight for defective potatoes, which included frost injury. (R. 124.) Plaintiff's employee sorted three cars which had been shipped by plaintiff, and which had been taken out to the camp. And which had been reported rejected. None of these cars exceeded the per cent allowed by the government specifications, and were not subject to rejection. Plaintiff's agent also examined the potatoes in the car in question and testified that the potatoes in it were equally as good as the potatoes in the cars which

had been rejected, but which proved to be within the specifications. (R. 85-86.)

On page 6 of defendant's brief in lines 16 and 17 there is the unqualified statement that the shipper took possession of the potatoes and reshipped them to Memphis, Tennessee, etc. This very broad assertion ought to be explained by the following facts:

On December 7th plaintiff received the original bill of lading which had been issued at Bailey. It was personally delivered to him by Mr. Hall at Grand Rapids. He then took it to Mr. Briggs, Division Freight Agent of the defendant, and surrendered it to him, and Mr. Briggs thereupon issued and delivered to the plaintiff another bill of lading whereby the goods were consigned to the order of plaintiff at Memphis. This bill is inside the rear cover of the record and marked "Exhibit D". This course was taken for the purpose of disposing of the potatoes to the best advantage. (R. 19.) After plaintiff had given reconsigning orders for the car it took the original draft which it had drawn and turned it over to the bank and gave them a check for the amount of it. (R. 24.)

Plaintiff's agent last saw the car in question on the tracks of the Southern Railway Company at Dumesnil on the day after Thanksgiving, and he saw the bill of lading covering the car in the depot of the Southern Railway at Dumesnil on the 30th day of November. (R. 24-25.)

The total freight charges for carrying this carload of potatoes from Bailey to Louisville under the original contract was \$113.53. (R. 61.) For the time that the car remained at Dumesnil the railway company assessed a demurrage charge of \$60.00, and the total freight when the car got to Memphis was \$232.01. Plaintiff was also compelled to pay a reconsigning charge at Grand Rapids of \$5.00, when it sent the car to Memphis. (R. 27-28.)

The following facts, which have been omitted by counsel for appellant, should have been stated.

The only testimony concerning the delivery of the bills of lading by Mr. Bindner to Mr. Kelsey is as follows:

"Q. Did you personally deliver the bills to Mr. Kelsey?

A. Yes, sir.

Q. At his request?

A. Yes, sir.

Q. Simply came in and asked for them and you had been holding them for him, and you gave them back?

A. Yes, sir." (R. 51.)

On December 4th James L. Bindner caused a telegram to be sent to H. Elmer Moseley at Grand Rapids, Michigan, notifying him that the car in question, along with other cars were rejected on track. This was the first and only notification from any railroad agent that Mr. Moseley had received that the car had been rejected. This information was conveyed to Mr. French by Mr. Moseley on December 5th, and was the first time that he had received any notice that this car had been rejected. (R. 88-89.)

On December 4th, 1917, the original bill of lading issued by defendant in this case at Bailey on November 3rd was in the possession of the Commercial National Bank at Indianapolis, Indiana. (R. 27.)

Mr. Bindner testified that in the ordinary course of business when the notify party comes in and turns over the bill of lading to him as cashier or agent of the railway company the bill of lading should be canceled. That is done by making a notation upon the bill of lading itself. The waybill is reported and run through the accounts and mailed to the auditor's office, and the canceled bill of lading is kept in the office to which it has been surrendered. (R. 54-56.)

Mr. Smith testified that just previous to the time of the arrival of this car Mr. Kelsey had called him by telephone and told him that he was expecting cars and to notify him by 'phone at the Waterson Hotel when same arrived. (R. 57.)

The car did arrive at Louisville on November 9th. Smith's record showed that he attempted to telephone Kelsey and on the 10th of November they sent him a postal card showing the arrival of the car and the usual information about the shipment, and stamped across the face of the card with a rubber stamp, in big letters, were the words "present bill of lading". This card was mailed to Marshall & Kelsey, care of Henry Waterson Hotel, and had a five-day return notice on it. (R. 60-61.) Mr. Smith testified that under the instructions of his employer it was necessary to put on this stamp "present bill of lading" on the notice of all shipments moving on order bills of lading. That it was the rule of his company that he should not make delivery of a car, billed as this one was, without the surrender of the bill of lading. (R. 61-62.)

Mr. Smith further testified that at the time Bindner called him up there was \$6.00 demurrage which had accrued upon the car, and that Bindner guaranteed the payment of the demurrage. That he did not demand a guarantee that the bill of lading would be surrendered to him, but simply took Bindner's word for that and sent the car out to Dumesnil, letting the rest of the freight charges, amounting to upwards of \$100.00, follow the car. The car had gone out when Mr. Kelsey came into Louisville and paid Smith the demurrage. (R. 63.)

The Big Four received this car from the Pere Marquette at Benton Harbor, and upon receipt of it the Big Four caused to be made out to accompany the car a waybill, by the terms of which it appeared that the car was consigned to the order of J. F. French & Co., Louisville,

Ky. (R. 53-54.) After Smith had made his arrangements with Bindner he did not issue a new waybill for the movement of the car to Dumesnil, but took the original waybill which had been issued at Benton Harbor and crossed out the word "Louisville" with red ink and wrote the word "Dumesnil" in place thereof, and under that the words "Southern Railway". (R. 59, 63.) Smith did not claim that he had any instructions from the shipper, or from the Pere Marquette, to change the destination, or change the billing or anything of that nature. (R. 64.)

Edward F. Baker was the agent of the Southern Railway at Dumesnil during the time in question. The other person with him in the office was Mr. Bindner. Mr. Baker testified that he had never had the bill of lading for the car in question; that he could not say that it was in the office of the Southern Railway at Dumesnil. (R. 28.)

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### ABBREVIATED AND CHRONOLOGICAL STATEMENT OF FACTS.

A concise summary of the situation which we think will be helpful is as follows:

Car shipped from Bailey, Michigan, and original order bill of lading issued November 3rd. (Exhibit B.) Plaintiff sold bill of lading to its bank at Grand Rapids immediately. (R. 18.) Car arrived at Louisville November 9th. (R. 57.) Notice given by Big Four at Louisville to Kelsey at Louisville, with instructions to present bill of lading, November 10th. (R. 60-61.) Bindner received the bill of lading from Kelsey about November 12th. (R. 44.) He called Smith about November 14th. (R. 45.) Smith released the car and ordered the waybill to be changed to read Dumesnil, Kentucky, on November 14th. (R. 59.) It arrived at Dumesnil November 18th. (R. 46.) On

December 4th bill of lading was in the possession of the Commercial National Bank at Indianapolis. (R. 27.) On December 4th the Southern gave the first notice that the car was rejected. (R. 88.)

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### ARGUMENT.

For the sake of brevity when we refer to the Federal Statute covering bills of lading (Act August 29th, 1916, Chap. 415, 39 Stat. at Large, 538) we will term it "The Act".

Counsel for petitioner have based their case squarely on the Act and principally on subdivision "c" of section 9 thereof. In order to maintain their position they must establish this fact, viz.:

"That the Big Four made a delivery at Louisville."

The first question to determine is, What is a delivery? The Act does not define it. Therefore, we must go outside the Act to ascertain what it is. If by so doing we find that the Big Four did not make a delivery at Louisville, then the defense must fall.

To state it differently, it always has been and is now our opinion that his case is to be decided upon common law principles; that in arriving at that decision we will never get to the Act itself, and that a discussion of the Act is not applicable to this case.

We will answer the arguments of counsel on the Act but not until we have given our reasons for our opinion that a discussion of the Act is unnecessary.

Our brief, therefore, will be divided into two parts, viz.: 1st, discussion of common law principles as applied to the facts in this case; 2nd, discussion of the provisions of the Act as applied to the facts in this case.

First: *Discussion of common law principles as applied to the facts in the case.*

We repeat that the crucial question in this case is, What is a delivery?

Our question is correctly answered by the opinion of the Court in *Salmon Falls Mfg. Co. vs. Tangier*, 21 Fed. Cases, No. 12,267, p. 266. On pages 267 and 268 the Court said:

"There may be a constructive or symbolical delivery in its legal effect equivalent to an actual delivery. \* \* \* In these cases though there is no passing the goods from hand to hand, traditio, there is a legal transfer of the possession, and the risk of the goods is shifted to the purchaser, or to the person to whom the delivery is made under any other contract, as though they had actually been put into his hands. A delivery in the strict and proper sense of the word seems to me always to imply this transfer of the possession, actual or legal, and with it its rights and responsibilities attached to the possession. One consequence involved in this doctrine is that to complete the delivery there must be an acceptance, actual or implied. This, as I think, is the sense in which the word is used in bills of lading, and in the delivery of the goods. \* \* \* The second obligation, that to deliver remained to be performed. Now, this is an act which the master cannot perform alone. All that the master can do alone is to deposit the goods at the place where the delivery is to be made and offer them to the owner named in the bill of lading."

We will apply the definition of a delivery to the facts in order to ascertain what was the legal status of the acts of the carrier.

The car arrived at Louisville on November 9th, 1917, with transportation charges of \$113.53 assessed against it. (R. 61.) French & Company being both consignor and consignee was alone directly responsible to the carrier for the payment of those charges. The carrier in addition had a lien upon the goods therefor. The title to the goods was in the Grand Rapids Savings Bank. The

possession was in the carrier. The risk of the goods was in the Grand Rapids Savings Bank.

On November 18th, 1917, the car arrived at Dumesnil, Kentucky, with transportation charges of \$126.00 assessed against it. (R. 54.) French & Company being both consignor and consignee was alone directly responsible to the carrier for the payment of those charges. The carrier in addition had a lien upon the goods therefor. The title to the goods was in the Grand Rapids Savings Bank. The possession was in the carrier. The risk of the goods was in the Grand Rapids Savings Bank.

There had been no transfer of possession. There had been no transfer of the rights and responsibilities of possession. There had been no acceptance, actual or implied. How then could there have been a delivery at Louisville?

The shipment moved from Louisville to Dumesnil consigned to the order of French & Company and not to Bindner. (R. 54.) This case itself is the best evidence possible that there had been no transfer of the rights and responsibilities of possession. The loss in this case is the effect of those rights and responsibilities and French & Company is still carrying that loss. Bindner did not accept the goods, either actually or impliedly. He neither saw the car at Louisville or Dumesnil. He was not interested in the potatoes himself, but merely had the car come out because he thought the government needed the potatoes therein. (R. 50.)

On December 5th, 1917, the Southern Railway notified us that the car was rejected. (R. 88.) If there had been an actual or implied acceptance at Louisville by Bindner, why notify us?

The answer is: There had been no delivery at Louisville to anyone.

On this phase of the case the importance of a delivery



must be borne in mind. We call to the attention of the Court its prior decisions on this point.

In the case of *North Penn. Rd. vs. Commercial Bank*, 123 U. S. 727, Mr. Justice Field, speaking for the court, at the bottom of page 733, said:

"Upon the evidence presented, and there was no conflict in it, the law was with the plaintiff. The duty of a common carrier is not merely to carry safely the goods entrusted to him, but also to deliver them to the party designated by the terms of the shipment or to his order, at the place of destination."

On page 737 the court further said:

"It follows from these views that the defendant, the North Penn. Company in allowing the cattle to go into the possession of the Blakers, through its agent, the Drove Yard Company, without the order of the consignee, who as stated above was also the owner and shipper, became responsible for their value to the Commercial National Bank which held its orders endorsed on the receipts for the shippers.  
• • •"

That conclusion was based upon the following statement of the rule as to delivery, found on page 734:

"But notwithstanding this difference in duties and responsibilities the railroad company when it undertakes generally to carry such freight becomes subject under similar conditions to the same obligations so far as the delivery of the animals which are safely transported is concerned, as in the case of goods. They are to be delivered at the place of destination to the party designated to receive them, if he presents himself, or can with reasonable efforts be found, or to his order. No obligation of the carrier whether the freight consists of goods or of livestock is more strictly enforced."

In the case of *Georgia, etc., Ry. vs. Blish Co.*, 241 U. S. 190, the court said:

"But delivery must mean delivery as required by the contract and the terms of the stipulation are

comprehensive—fully adequate in their literal and natural meaning, covering all cases where the delivery has not been made as required. When the goods have been misdelivered there is as clearly a failure to make delivery as when the goods have been lost or destroyed. \* \* \*

There having been no delivery, it is but natural to inquire, what was the effect of the acts of the Big Four at Louisville?

We have called it a reconsignment. However, that is not entirely correct, for the reason that while the movement from Louisville to Dumesnil could only properly be accomplished by a reconsignment, it was unlawfully effected in this case.

The Michigan Supreme Court termed it an irregular reconsignment (R. 113) and we believe that that is a correct characterization of the transaction.

A reconsignment is a well defined branch of the railroad service. In the case of *Doran & Co. vs. M. C. & St. L. R. Ry.*, 33 I. C. C. 523, the Commission said:

"In no case has the Commission condemned reconsignment as a service. The abuse and not the reasonable use of the practice has been the subject of criticism. If granted, subject to such restrictions as may be necessary to prevent the abuses to which the practice is susceptible, and conditioned upon the payment of a reasonable charge for the additional labor, costs and liability which the service imposes upon the carrier, there appear to be no substantial reasons for apprehension that a modification of the present rules of the carriers to the extent of permitting reconsignment on basis of the through rate will be attended with injurious results. Reconsignment prevails throughout the greater portion of the United States. \* \* \* These facts tend to strengthen the conclusion that reconsignment within reasonable limits is of benefit to the public and not without its advantages to the carrier."

In the case of *Justice & Co. vs. Penna. R. R. Co.*, 26

I. C. 478, the Commission defined a reconsignment and a diversion and differentiated between the two. The definition is as follows:

"If the destination of a shipment is changed before arrival at the original billed destination it constitutes a diversion, but if made after arrival at such destination it is a reconsignment."

A delivery is one of the duties to be performed by the carrier; a reconsignment is another. They are as different as day from night. The first involves an absolute termination of the contract relations at the original billed destination. The second provides for a continuance of the contract relations of the original contract, and a further transportation by the carrier to a new destination, for an additional compensation to the carrier.

It cannot be denied that the consent of Mr. Smith of the Big Four to accede to the request of Mr. Bindner, took place after the car arrived at Louisville, its destination, and required a change of destination.

Mr. Smith testified:

"Q. Now, you sent the car out from Louisville the 16th of November to Dumesnil?

A. Yes, sir.

Q. Did you make out new billing, or do you make out a new bill so that the car could come on?

A. I had the heading changed from Louisville to Dumesnil.

Q. That is, instead of making out a new waybill, you merely changed that and forwarded the car to Dumesnil?

A. To Dumesnil, exactly. (R. 59.)

A. No, sir; when Mr. Bindner told me he had it, I ordered the heading of the billing changed, and all the charges to follow outside of demurrage to the Southern Railway. I sent the car to the agent or his cashier, his attendant, at Dumesnil.

Q. Did you yourself change this billing on Exhibit "F" from Louisville to Dumesnil?

A. No, sir; I had the bill changed by a clerk in the office." (R. 63.)

How can it be successfully contended that the act of the Big Four was other than a reconsignment.

From a railroad operating standpoint it was a reconsignment pure and simple. The question then arises, was it lawfully effected?

For at least eight years prior to the passage of "The Act" order bills of lading contained this provision:

"Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect and this bill of lading shall be enforceable according to its original tenor."

We think it will not be controverted that the change of the destination in a bill of lading would be a material alteration of it, and must, therefore, be lawfully accomplished in the manner provided for by the bill itself. That is to say, when Bindner wanted the car to go to Dumesnil if he had proceeded properly he would have been compelled to have gone to an agent of the Pere Marquette Railway Company and had the change endorsed thereon and signed by that agent. As we have seen, this was not done. No change was endorsed on the bill itself. The alteration was made on the waybill. The bill then must be enforced according to its original tenor. This left the carrier in the position of having agreed to deliver the car at Louisville and of having actually taken it from and beyond Louisville to Dumesnil. This constituted a misdelivery and a conversion, which made the carrier liable. As Mr. Justice Hughes said in the *Blish Milling case*, *supra*:

"When the goods have been misdelivered there is

as clearly a failure to make delivery as when the goods have been lost or destroyed."

We believe that we have shown on common law principles that our property was misdelivered by the carrier. The liability for that loss follows as a matter of course. It has not been necessary to discuss or refer to "The Act" in order to arrive at this result.

This makes applicable the rule of this Court as stated by Mr. Justice Holmes in the case of *Arkansas Southern Railroad vs. German National Bank*, 207 U. S. 270. The particular portion of the opinion to which we refer is found on the bottom of page 275 and is as follows:

"But according to the well settled doctrine of this court with regard to cases coming from state courts, unless a decision upon a federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed. And even when an erroneous decision upon a federal question is made a ground, if the judgment also is supported upon another which is adequate by itself, and which contains no federal question, the same result must follow as a general rule. Moreover, ordinarily this court will not inquire whether the decision upon the matter not subject to its revision was right or wrong.

\* \* \* Therefore, if we should be of opinion, as we are, that the Supreme Court rested its judgment upon principles of common law as it understood them, we should go no farther, although that court also upheld and relied upon the statute, whether in our opinion its views were right or wrong."

The decisions of the Michigan Supreme Court now become controlling.

In *Perkett vs. Manistee, etc., R. R. Co.*, 175 Mich. 253, the plaintiff shipped a car of apples on an order bill of lading to Chamberlain, South Dakota. The car never reached Chamberlain but was stopped at Mt. Vernon, the residence of the notify party, six miles short of its destination. Because of this fact the value of the apples became a total loss to plaintiff.

The Court in affirming a judgment of the lower court in favor of plaintiff, said:

"He (plaintiff) had his contract of shipment and was entitled to rely upon it, and Davis (the notify party) had no right to change the destination without producing the bill of lading."

The decision in this and other cases decided by it on the same subject were reaffirmed by the Michigan Supreme Court, in its opinion, in the case at bar. (R. 108.)

On page 24 of their brief counsel say:

"There are no prior decisions, either State or Federal laying down any such doctrine as the Supreme Court of Michigan enunciates in the case at bar."

We disagree with counsel. The *Perkett* case is on all fours with this case. The facts are different in this particular. There the car was stopped short of destination. Here the car was carried beyond destination. The principle involved is the same.

The Michigan Court said that the destination could not be changed without producing the bill of lading. This clearly means that the decisions would have been the same had the notify party in that case had actual possession of the bill. Possession of the bill is not sufficient to warrant a change of destination. In order to accomplish that the bill must be produced. In so deciding it has simply given effect to the provisions of article 10 of the bill itself.

We believe that we have demonstrated not only that the decision of the Michigan Court was correct, but that in fact the decision was not based upon a federal question and that a decision of the federal question was not necessary to the judgment.

Under those circumstances, a consideration of the fed-

eral question is unnecessary and the judgment should be affirmed.

Second: *Discussions of the provisions of "The Act" as applied to the facts in this case.*

Our first duty is to ascertain the true meaning of the Act. When that has been determined, an intelligent application of its provisions to the question at issue, can be made.

Counsel have repeatedly made statements in their brief to the effect that a bill of lading endorsed in blank "is a negotiable instrument" (p. 12); "it passes from hand to hand by delivery" (p. 12); "it becomes in effect payable to bearer" (p. 12); "any person in whose possession it is, whether rightfully or wrongfully, is entitled to a delivery of the car" (p. 12); "thereafter the bearer is the party with whom the carrier is justified in dealing." (P. 12.) "The shipper endorsing the bill in blank says to the carrier: 'The person in possession of this bill of lading is entitled to the car. You may follow his instructions as to its disposition.'" (P. 18.) "It was the Grand Rapids Bank, and in turn the Indianapolis Bank, then Kelsey and then Bindner who had the contract with the carrier." (P. 19.) "This bill of lading was endorsed in blank and delivery to a person in possession was, therefore, a delivery 'to his (the shipper's) order.'" (P. 20.) "Delivery to Bindner was delivery to the shipper's order, because the shipper by endorsing the bill of lading in blank thereby made it in effect 'payable to bearer'—made it negotiable so that any person who acquired possession of it (rightfully or wrongfully) was entitled to a delivery of the car." (P. 20.)

We have set forth the various positions of counsel so that we could answer them collectively and thus save repetition.

The facts on which counsel depend are these. On November 3rd, 1917, French & Company was the owner of the potatoes in the car and the bill of lading issued therefor. (R. 17-18, Exhibit B.) On November 7th they endorsed the bill of lading in blank, attached to it a draft on Marshal & Kelsey for \$1,086.75, and took them to the Grand Rapids Savings Bank who gave them therefor credit for \$1,086.75 on their commercial account. (R. 18.) The Grand Rapids Savings Bank forwarded the draft and bill of lading to the Commercial National Bank of Indianapolis, for collection. The Commercial National Bank delivered the bill of lading to Mr. Kelsey and retained the draft in its possession. Mr. Kelsey did not pay the bank or anyone else a single penny for the bill of lading. Mr. Kelsey took the bill of lading to Dumesnil and delivered it to Mr. Bindner. No consideration whatsoever passed from Mr. Bindner to Mr. Kelsey for the bill of lading.

Mr. Bindner testified:

“Q. Kelsey gave you this bill, didn't he?

A. Yes, sir.

A. Why, he had several bills of lading, five or six different times, sometimes one, two, three, and he came in the office and asked me — he had a whole lot of stuff in his pockets, and I reckon he knew the value of order notify bill of lading, and so he asked me to keep them for him, and so I did; I took them and chucked them in a drawer.

Q. And that is the way you held them all this time?

A. Yes, sir.

Q. And they were in your charge all the time?

A. I was holding them for him.

The Court: Weren't you holding them for the Southern Railroad?

A. No, sir. (R. 48.)



Q. Well, at the time you called the Southern or at the time you called the Big Four, you held that bill of lading for Mr. Kelsey?

A. Yes.

Q. And you always held it for Mr. Kelsey?

A. Yes.

Q. And when you delivered it back, you delivered it to Mr. Kelsey?

A. Yes, sir.

Q. And for no other purpose?

A. For no other purpose.

Q. And you did not hold it at any time in your capacity as an agent or employe of the Southern Railway."

A. I did not; no, sir. (R. 49.)

Q. Did you personally deliver the bills to Mr. Kelsey?

A. Yes, sir.

Q. At his request?

A. Yes, sir.

Q. Simply came in and asked for them and you had been holding them for him and you gave them back?

A. Yes, sir." (R. 51.)

Under those circumstances was there a negotiation or transfer of the bill of lading to the Indianapolis bank, or to Mr. Kelsey or to Mr. Bindner?

To determine this question we must ascertain the meaning of the words "negotiated" and "transfer" as used in the Act. Negotiate means:

"To transfer for a value received as a note, bond or other written obligation."

*Funk & Wagnalls New Standard Dictionary.*

"To sell, to pass, to transfer for a valuable consideration."

*Blakiston vs. Dudley*, 5 Duer (N. Y. ) 373, 377;

*Gloversville Nat. Bk. vs. Wells*, 15 Hun. (N. Y.)

51, 63; 29 Cyc. 661.

“To transfer for a valuable consideration.”

*Foster vs. Bowes*, 2 Ont. Pr. 256, 258; 29 Cyc. 661.

The Indianapolis Bank paid the Grand Rapids Savings Bank nothing for the bill. It was a collection agent pure and simple. The bill was not sold, passed or transferred to it. Therefore, the bill was not negotiated to it and it did not negotiate the bill to Kelsey.

The reply of counsel for petitioner to this contention will be, that the Indianapolis Bank did negotiate the bill to Kelsey under the provisions of Section 30 of “The Act” which reads in part as follows:

“An order bill may be negotiated by any person in possession of the same, however such possession may have been acquired. \* \* \* ”

This serves to demonstrate the fallacy of the reasoning of counsel for petitioner. They have assumed that a bill indorsed in blank can be negotiated by a simple passing of it from hand to hand, when as a matter of fact and law there can be no negotiation without a sale or transfer for a valuable consideration. Our contention can be conclusively proven by a reference to Sections 30 and 37 of “The Act.”

Section 30 provides that “an order bill indorsed in blank may be negotiated by any person in possession of the same, however such possession may have been acquired. \* \* \* ”

Section 37 provides in effect that the validity of the negotiation of a bill is not impaired by breach of duty, etc., if the person to whom it was negotiated gave value therefor in good faith and without notice.

Section 30. The Indianapolis bank had possession of the bill with instructions to hold it until the draft was paid. It handed the bill to Kelsey, who paid nothing for it. Under the theory of counsel for petitioner, as to the

meaning of Section 30, that would be an absolute negotiation from the Indianapolis bank to Kelsey, notwithstanding the fact that in handing the bill to Kelsey the Indianapolis bank breached its trust.

Section 37. The Indianapolis bank had possession of the bill with instructions to hold it until the draft was paid. It handed the bill to Kelsey, who paid nothing for it. This would not be a valid negotiation under Section 37, for the reason that Kelsey did not pay value therefor in good faith and without notice and the act of the Indianapolis bank in handing it to Kelsey constituted a breach of trust.

If we adopt the theory of negotiation advanced by counsel, the same act would be good negotiation under Section 30, and an invalid negotiation under Section 37. The two sections would be inconsistent, and one must fall. Courts do not lightly adopt a construction that will make parts of a statute invalid. They seek to give effect to all its provisions.

Testing the two sections on our theory of negotiability we get the following result.

Sec. 30. The Indianapolis bank had possession of the bill with instructions to hold it until the draft was paid. It handed the bill to Kelsey who paid nothing for it. Under our theory this was not a negotiation, because the bank did not sell or transfer the bill to Kelsey for a valuable consideration.

Sec. 37. The Indianapolis bank had possession of the bill with instructions to hold it until the draft was paid. It handed the bill to Kelsey who paid nothing for it. This was a breach of trust on the part of the bank and Kelsey knew it. Under our theory this was not a negotiation because Kelsey did not pay value for it, in good faith and without notice.

Conversely, under Section 30, if Kelsey had purchased

the bill from the bank for value, it would have been a good negotiation.

Under Section 37, if Kelsey had purchased the bill from the bank for value in good faith and without notice, it would have been a good negotiation.

Under Section 30, a purchase for value is sufficient; under Section 37, a purchase for value in good faith and without notice is required.

By adopting this construction, both sections are in harmony with each other and the remaining sections of the Act. Each serves a distinct purpose, and at the same time supplements the other. They are not inconsistent.

The same result would be reached as to the transactions between Kelsey and Bindner. Kelsey had a wrongful possession of the bill. He handed it to Bindner, who paid nothing for it.

If counsel for petitioner is correct, this would be a negotiation under Section 30 and not under Section 37.

If we are correct it would not be a negotiation under either.

If Bindner had purchased the bill from Kelsey for value, it would have been a negotiation under Section 30.

If Bindner had purchased it for value in good faith and without notice it would have been a negotiation under section 37.

There is one important element that must not be lost sight of in construing this Act, viz.: the purpose which actuated the adoption of the form of bill of lading used in this case. It was only after four years of study and consideration of the subject, by a committee composed of representatives of the carriers, shippers and bankers of the country, and their report to the Interstate Commerce Commission that this form was adopted. The

Interstate Commerce wrote an opinion approving it in 1908 and therein Commissioner Knapp said:

"The main point in this connection is that the order bill will possess a certain degree of negotiability, while the straight bill will be non-negotiable, and is so stamped on its face. Moreover, and this is a matter of consequence, the order bill of lading will be required to be surrendered upon or before the delivery of the property to the consignee. It is believed that this plan will in large part meet the requirements of the banking concerns of the country which advance large sums of money upon bills of lading, and are entitled to a reasonable measure of protection."

*In re Bills of Lading*, 14 I. C. C. 346, 348.

It will also be remembered that the present form of bill of lading had been in actual use for eight years before "The Act" took effect. We take it, that it will be presumed, at least until a contrary intention is shown, that the purpose of "The Act" was to further strengthen bills of lading, and to make their use still more secure to the commercial interests of the country, than otherwise.

In our judgment this purpose will be entirely frustrated if the construction placed upon "The Act" by counsel, is to prevail.

We believe that our position is corroborated by a construction of the word "transfer" as used in the Act.

Transfer, as a noun, means:

"The act by which the owner of a thing delivers it to another person with the intent of passing the rights he had in it to the latter."

"Any act by which the owner of anything delivers or conveys it to another with the intent to pass his rights therein."

38 Cyc. 939.

Transfer, as a verb, means:

"To convey or pass over the right of one person to another."

38 Cyc. 940.

Section 29 of "The Act" provides:

"A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied to transfer the title to the bill or to the goods represented thereby."

This section incorporates the exact definition that we have given of the word "transfer". There can be no transfer of the bill unless there is an agreement to pass title to it, or to the goods.

Counsel must rely entirely upon their theory that a handing over of a bill of lading without value was a negotiation. They cannot adopt the contention that the bill was properly transferred. Section 29 provides that "a bill may be transferred by the holder". Section 42 says that the "holder of a bill means a person who has both actual possession of such bill and a right of property therein." The Indianapolis bank did have actual possession of the bill for a specific and limited purpose. It did not have a right of property in the bill. Therefore, it could not have transferred the bill.

Providing that the bill had been indorsed by the Grand Rapids Savings Bank "pay to the order of the Commercial National Bank" and it had handed this bill to Kelsey without indorsing it, Kelsey could not thereby have obtained any title to the bill or to the goods under section 32. The reason for this is that the Indianapolis bank had no title and could not, therefore, transfer any.

Under those same circumstances Kelsey did not acquire a right against the Indianapolis bank to compel it to indorse the bill under section thirty-three. This is plain because section thirty-three provides that the only cir-

cumstances under which such a right is obtained is when an order bill is transferred for value by delivery. Kelsey having paid no value could compel no indorsement.

It must be borne in mind that in no place does the Act provide for a transfer of the bill itself without an accompanying agreement, express or implied, to transfer the title to the bill itself, or to the goods represented thereby.

In the last analysis, therefore, counsel must rely upon the provisions of Section 27 which provide in effect "that an order bill indorsed in blank may be negotiated by delivery" and section 30 which in effect provides that "an order bill indorsed in blank may be negotiated by any person in possession of the same, however such possession may have been acquired."

If counsel's contention is correct that the act of the Grand Rapids Savings Bank in sending the bill to the Indianapolis bank for collection, and the act of the Indianapolis bank in handing the bill of lading to Kelsey without value, and the act of Kelsey in handing the bill of lading to Bindner to keep for him, without the payment of value, was a negotiation of the bill, then it must be held that the Indianapolis bank, then Kelsey and then Bindner respectively obtained the title to the goods that French & Company had, or had power to convey, and the title to the goods that the Grand Rapids Savings Bank had or had power to convey, and that each of them had during the time the bill was in the possession of each of them, the obligation of the carrier to hold the goods for them according to the terms of the bill.

To state it differently. If when the Grand Rapids Savings Bank sent this bill of lading to the Commercial National Bank of Indianapolis for collection, the Indianapolis bank paying no value therefor, and when the Indianapolis bank handed the bill of lading to Kelsey and he paid no value therefor, and when Kelsey handed the bill to Bindner and he paid no value therefor, this constituted

a negotiation by delivery under section 27, then the Indianapolis bank, and Kelsey and Bindner acquired all of the rights given by section 31 of the act. The section is as follows:

"A person to whom an order bill has been duly negotiated acquires thereby—

(a) Such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value, and also such title to the goods as the consignee and consignor had or had power to convey to a purchaser in good faith for value; and

(b) The direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him."

Practically speaking, that means that the Indianapolis bank, being a mere collection agency, acquired title to a bill of lading which represented goods of the value of upwards of \$1,000.00, and also acquired title to the goods themselves, and that Kelsey acquired the same rights and Bindner also acquired the same rights, and further than this, each of them acquired all of the obligations of the carrier under the bill of lading.

They acquired all of these rights as against the Grand Rapids Savings Bank, notwithstanding the fact that the Grand Rapids Savings Bank had paid \$1,086.00 for this bill of lading and for these goods, and these three parties had paid nothing. This doctrine is fraught with tremendous possibilities, but there can be no middle ground. These people acquired all or they acquired nothing.

But if negotiation means a sale or a transfer upon a valuable consideration, then there was no negotiation by the Grand Rapids Savings Bank to the Commercial National Bank of Indianapolis, nor from the Indianapolis bank to Kelsey, nor from Kelsey to Bindner, and neither of these parties acquired any title to the bill or the goods represented thereby, or any rights which the carrier owed



to the consignor and consignee. They acquired no rights under section 31 of the Act and counsel's statement on page 19 of their brief is entirely wrong wherein they say:

"After indorsing this bill of lading in blank and giving it circulation the shipper no longer had a contract with the carrier. It was the Grand Rapids Savings Bank and in turn the Indianapolis bank, then Kelsey and then Bindner who had the contract with the carrier."

We need cite only one authority for our position and that is the decision of this Court delivered by Mr. Justice Strong in the case of *Shaw vs. Railroad Co.*, 101 U. S. 557.

The reasoning in this case so clearly answers the fallacious arguments advanced by counsel, that we are quoting from the same at length. On page 562 the Court said:

"In considering this question, it does not appear to us necessary to inquire whether the effect of the bill of lading in the hands of Miller & Brother is to be determined by the law of Missouri, where the bill was given, or by the law of Pennsylvania, where the cotton was delivered. The statutes of both states enact that bills of lading shall be negotiable by indorsement and delivery. The statute of Pennsylvania declares simply, they 'shall be negotiable and may be transferred by indorsement and delivery;' while that of Missouri enacts that 'they shall be negotiable by written indorsement thereon and delivery, in the same manner as bills of exchange and promissory notes.' There is no material difference between these provisions. Both statutes prescribe the manner of negotiation, i. e., by indorsement and delivery. Neither undertakes to define the effect of such a transfer."

On pages 562 and 563 the Court said:

"We must, therefore, look outside of the statutes to learn what they mean by declaring such instruments negotiable. What is negotiability? It is a technical term derived from the usage of merchants

and bankers, in transferring, primarily, bills of exchange and, afterwards, promissory notes. At common law no contract was assignable, so as to give to an assignee a right to enforce it by suit in his own name. To this rule bills of exchange and promissory notes, payable to order or bearer, have been admitted exceptions, made such by the adoption of the law merchant. They may be transferred by indorsement and delivery, and such a transfer is called negotiation. It is a mercantile business transaction, and the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability. The term 'negotiable' expresses, at least primarily, this mode and effect of a transfer."

At the bottom of 563 the Court said:

"It does not necessarily follow, therefore, that because a statute has made bills of lading negotiable by indorsement and delivery, all these consequences of an indorsement and delivery of bills, and notes, before maturity ensue or are intended to result from such negotiation."

On pages 565 and 566 the Court said:

"Bills of lading are regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bills which cover it. They are, in commerce, a very different thing from bills of exchange and promissory notes, answering a different purpose and performing different functions. It cannot be, therefore, that the statute which made them negotiable by indorsement and delivery, or negotiable in the same manner as bills of exchange and promissory notes are negotiable, intended to change totally their character, put them in all respects on the footing of instruments which are the representatives of money, and charge the negotiation of them with all the consequences which usually attend or follow the negotiation of bills and notes. Some of these consequences would be very strange if not impossible. Such as the liability of indorsers, the duty of demand *ad diem*, notice of non-delivery by the

carrier, etc., or the loss of the owner's property by the fraudulent assignment of a thief. If these were intended surely the statute would have said something more than merely make them negotiable by indorsement. No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express. Especially is so great an innovation as would be placing bills of lading on the same footing in all respects with bills of exchange not to be inferred from words that can be fully satisfied without it. The law has most carefully protected the ownership of personal property, other than money, against misappropriation by others than the owner, even when it is out of his possession. This protection would be largely withdrawn if the misappropriation of its symbol or representative could avail to defeat the ownership, even when the person who claims under a misappropriation had reason to believe that the person from whom he took the property had no right to it."

It is our contention that under a correct construction of the Act the title to the bill of lading and the title to the goods, and the direct obligation of the carrier to hold possession of the goods according to the terms of the bill never passed from the Grand Rapids Savings Bank from the time French & Company deposited the draft and bill of lading in the bank and received full credit therefor until December 7th, 1917, when the Grand Rapids Savings Bank sold and transferred this draft and bill of lading to French & Company for a valuable consideration.

*Was Bindner a person in possession of the order bill of lading indorsed in blank?*

This is the next question to be answered. Counsel reiterate over and over again that Bindner was a person in possession of the bill. Again counsel have, in our opinion, used this word without any reference to its natural, plain and ordinary signification. The rule that

in the interpretation of statute words in common use are to be construed in their natural, plain and ordinary signification is too well established to require the citation of any authorities.

In Funk & Wagnall's Standard Dictionary the word "possession" as understood in the law is defined as follows:

"The exercise of such a power over a thing as attaches to lawful ownership; \* \* \* the condition under which one may exercise power over a thing at pleasure, to the exclusion of all others."

It would be futile to attempt to elaborate upon that definition. The correctness of it can be well exemplified by comparison. For instance in the law there is such a thing as a naked possessor. The same author defines such a person to be:

"A claimant to property without other rights than physical holding or occupancy."

Applying the correct principles of construction to the language employed in section 9 it is very clear that a person to be in possession of a thing must have a certain right or interest of some nature in it for the time being. Possession means more than naked possession.

This construction is aided by a reference to the act itself.

Section 8 provides for a delivery of the goods upon a demand by the holder of order bill. Section 42 contains the following definition:

"A holder of a bill means a person who has both actual possession of such bill, and a right of property therein."

There is no question in our mind but that a holder must have a greater right in the bill than a person in possession of. At the same time the right of a person in possession must be such that he may exercise power over

it at his own pleasure, and to the exclusion of all others.

Such a construction not only gives to the words used their plain, ordinary and natural meaning, but results in making sections 8 and 9 harmonious and consistent with each other.

Bindner was not in our judgment even a naked possessor. He was not an individual in this case. Bindner was Kelsey. Bindner did not claim to have an interest in the goods, nor right thereto. He acquired no rights from Kelsey, nor did he claim any. He was as much Kelsey's as far as this case is concerned as a safety deposit box in a vault rented by Kelsey would have been. He held the bills for Kelsey and returned them to him. He had no instructions from Kelsey to do anything in regard to them. Kelsey did not ask him to tell the Big Four that he had the order bill. (R. 48-49.)

Bindner was not in possession of this order bill because it conclusively appears from his own testimony that he could exercise no power over it at his pleasure and to the exclusion of Kelsey. (R. 48-51.)

*Was there a delivery of the car to Bindner at Louisville?*

It is our contention that even though the Court should hold that Bindner was a party in possession of the bill of lading within the meaning of section 9 of the Act, that there was no delivery to him at Louisville or anywhere else. We have already shown that there was no delivery under the rules of the common law. We do not intend to repeat what we there said. We do want to answer a few of the arguments which counsel have advanced on pages 13 to 22 of their brief.

On page 15 counsel state:

"While in possession of the bill he (Bindner) called the agent of the Big Four on the telephone, assured him that he (Bindner) had the bill of lading

and asked him to send the car out to the camp by turning it over to the Southern Railroad." (R. 59.)

That statement is incorrect in so far as it states that Bindner asked Smith to send the car out to the camp by turning it over to the Southern Railroad. The exact testimony is:

"Q. What did he say? Give the exact words. What did Mr. Bindner say to you over the telephone?

A. Mr. Bindner said, I have the bill of lading on that car and why don't you send it out.

Q. And what?

A. And why don't you send it out?

Q. He asked you to send it out?

A. He asked me to send it out.

Q. What did you tell him?

A. I told him I would providing he would—or the Southern Railway would—guarantee me our car service and that he had the bill of lading." (R. 59.)

On page 15 counsel further state:

"Mr. Kelsey, who had turned the indorsed bill of lading over to him (Bindner) had asked him to call the Big Four about the car." (R. 49.)

That is true but Mr. Kelsey did not tell Mr. Bindner to tell the Big Four he had the bill of lading. The exact testimony is as follows:

Q. Now, as I understand you, when you got this bill of lading you held it for Kelsey at his request?

A. Yes, sir.

Q. Did he tell you to call up the Big Four?

A. Yes, sir.

Q. He did?

A. Yes, sir.

Q. Well, did Kelsey tell you to tell the Big Four that he had the bill of lading?

A. The bill of lading?

A. Yes, sir.

A. No, sir.

Q. He did not?

A. No, sir.

Q. You did that on your own hook?

A. Yes, sir."

At the bottom of page 15 and top of page 16 counsel state:

"After the car arrived, Mr. Kelsey had again gone to the office of the Big Four and paid some demurrage charges on the car so the Big Four would release it." (R. 51-63.)

That is hardly correct. The Big Four let the car go out without requiring the payment of the demurrage, and at the time they let the car go forward the Big Four actually billed the Southern Railway for this demurrage. The bill is found on page 52 of the record. After the car had gone forth and after the Southern had mailed the bill, Mr. Kelsey went to the office of the Big Four at Louisville and paid the demurrage, and then the Big Four wrote to the Southern Railway at Dumesnil, stating that Kelsey had called at the office and paid the demurrage of \$6.00 and told the Southern to cancel the bill. (R. 53.)

Counsel in referring to the change of the waybill and the sending of the car from Louisville to Dumesnil make this statement on pages 16 and 17.

"If it was a reconsignment, a change of destination—it was a reconsignment and change of destination at the request of the person in possession of the bill of lading—Bindner—and therefore a delivery to Bindner."

Also this statement on pages 18 and 19:

"The Big Four had the right to reconsign, reship, or do anything else with the car at the request of Bindner, who by virtue of his possession of the bill of lading controlled the car after it reached its destination at Louisville, just as much as if he had been the original shipper."

This is clearly incorrect. Section 9 or no other section in the Act provides that the carrier is justified in making

a reconsignment to a person in possession of an order bill indorsed in blank. The reason is very plain. A reconsignment properly effected necessitates a change upon the original order bill of lading. Section 10 of the conditions on the bill of lading itself, and Section 13 of the Act provides as follows:

"Any alteration, addition or erasure in a bill after its issue without authority from the carrier issuing the same, either in writing or noted on the bill, shall be void, whatever be the nature and purpose of the change, and the bill shall be enforceable according to its original tenor."

The only manner in which a reconsignment can be properly effected would be to actually deliver the original bill of lading to an agent of the initial carrier and have that agent indorse the change upon the original order bill of lading and sign it. It is impossible to indorse and sign by telephone. The actual instrument must be there in order to make the indorsement thereon. Therefore, a person in possession of an order bill indorsed in blank cannot properly effect a reconsignment, and much less can he effect it with the terminal carrier when it is a different one from the initial carrier.

The proof of the pudding is in the eating. On December 7th, 1917, when we decided to dispose of the potatoes in the car, in order to minimize the loss, we decided that the best place to send the car was to Memphis. We did not take delivery of the car at Dumesnil, but caused it to be reconsigned to Memphis. We had the original bill in our possession and went to the agent of the Pere Marquette at Grand Rapids and told them what we wanted to do. Did they say, "very well, we will change the waybill and send it on?" No, indeed, we were obliged to and did surrender the original bill to the Pere Marquette. The Pere Marquette actually canceled this original bill by making the following notation thereon: "Cancelled.



New B/L issued in exchange. Dec. 11, 1917. F. M. Briggs, D. F. A., P. M. Ry. Exhibit B."

They actually issued a new bill bearing this notation: "This bill of lading is issued in exchange for bill of lading No. none issued at Bailey, Mich., on the 3rd day of November, by the Pere Marquette Railway Company. Reconsignment accomplished 12/8/17. Exhibit D."

We are at a loss to understand why Bindner, who at the best was but a naked possessor of the bill of lading, had so much greater rights in the premises, than we did, when we were the actual owners of the bill and of the goods. Bindner reconsigned from Louisville to Dumesnil. We reconsigned from Dumesnil to Memphis. In both instances there was no shifting of the risk of possession; no transfer of the rights and responsibilities of possession; no acceptance actual or implied; all charges followed the car; the goods were consigned to French & Company. We were compelled to surrender the original bill, and Bindner was not. Yet, according to counsel, one of these acts was a delivery and the other a reconsignment. It cannot be. There is no doubt in our mind that both of them were a reconsignment, in fact and law. One was regular and the other irregular. The fact that one was accomplished without following the proper practice, cannot change it into a delivery.

From pages thirteen to twenty-two counsel has argued that the act of the Big Four was a delivery to Bindner at Louisville. He has stated the proposition in various and ingenious ways, but every hypothesis is based upon the fact that there was in fact a delivery. In other words he assumes a delivery, and using that assumption as his premise proceeds to prove a delivery.

We are not going to answer these statements one by one. It would be a waste of the Court's time to pursue the subject further. We have shown the Court what a delivery is; also a reconsignment. We are not aware of

anything more we can do that would assist the Court in arriving at the correct conclusion, and we will pass to the next question.

*If the Court should hold that there was a delivery under section nine, the carrier is nevertheless liable under section ten.*

Subdivision (b) of section 10 of the Act provides that even though the carrier delivered the goods under the provisions of subdivision (c) of section 9, the carrier shall be liable if prior to such delivery:

“(b) had information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods.”

We think that we have shown that Bindner was not such a person. Furthermore, counsel have to all intents and purposes admitted it. On page 12 of their brief they say:

“While Bindner may not have been a person lawfully entitled to the possession of the goods, he was a person in possession of an order bill for the goods, indorsed in blank by the consignee.”

The only question that remains is—did Mr. Smith of the Big Four have that information, at the time he changed the waybill and sent the car out? We quote from his testimony as follows:

“It was the rule of my employer that I should not deliver the shipment described in this waybill, without the surrender of the bill of lading, and I knew under the strict interpretation of the rules given me by my employer that I had no right to let this car to Dumesnil without the surrender of the original bill of lading.

Q. And when you understood from Mr. Bindner that he had the bill of lading, you took a chance?

A. I took a chance on his word that he had the bill of lading and on Mr. Kelsey's word that he surrendered the bill of lading to Mr. Bindner, for the simple reason that he paid the demurrage charge for

the release of the car to let me send the car to Dumesnil.

Q. Well, now, did you ever receive this original order bill?

A. No, sir.

Q. In the hands of the Southern?

A. No, sir.

Q. Did you ever demand it from them?

A. No, sir, Mr. Bindner told me he had it. I ordered the heading of the billing changed, and all the charges to follow outside of demurrage to the Southern Railway. I sent the car to the agent or his cashier, his attendant, at Dumesnil. (R. 94-95.)

Q. Yes, you have never seen it?

A. I never saw it.

Q. You never saw it in his possession?

A. From the evidence it is proved that it was already in his office at the time the car was there.

Q. I am talking about you personally.

A. Personally, I never saw the bill.

Q. You don't know when he got it, don't know when he gave it back?

A. I don't know when he got it or when he gave it back. All I know he had it, told me he had it when I released the car." (R. 97.)

When Smith admitted that before he released the car, he knew that he had no right to let the car go to Dumesnil without the surrender of the bill of lading, and in doing so took a chance, we think he had the information contemplated by paragraph (b) of section ten. Counsel cannot gracefully contend that the surrender of the bill was not necessary in view of the fact that when we made a similar request of them on December 7th, in order to get the car to Memphis, they required the surrender of the original bill, and canceled it and issued a new one in place of it.

*French & Company are entitled to recover in this action under the provisions of section eleven.*

The carrier did not take up and cancel the bill. French

and Company got it on December 7th, which of course was after the Big Four had let the car go from Louisville to Dumesnil. Thus far we are strictly within the terms of the section. The question then arises, are we purchasers for value in good faith? If we are, our right of recovery is unquestioned. Counsel say that we were not purchasers for value in good faith. He does not enter into an extended discussion of the subject, however.

We paid the Grand Rapids Savings Bank \$1,086.75 for this bill on December 7th. That is not disputed. (R. 18.) It was the same amount that the bank had paid us for it a month previous. It was \$680.20 more than the goods represented by it were worth at that time. (R. 28.)

We assume that we will not be taking too much for granted when we say that we were purchasers for value. Were we purchasers in good faith? "Good faith" is defined as follows:

"The observance of, or the intention to observe, honesty and fair dealing; absence of intention to deceive."

*Funk & Wagnall's New Standard Dictionary.*

If there is one thing that is more clearly established by this record than any other, it is that French & Company purchased this bill of lading for the sole purpose of handling these goods for the benefit of all concerned and to make the loss as light as possible. (R. 19.) Mr. French was of the opinion that because of the fact that he was engaged in the business of handling potatoes he could probably get more out of them than any one else. He must have succeeded fairly well since the petitioner did not dispute the proceeds of the car, but on the contrary stipulated as to what the car had brought on the resale at Memphis. When a man actually pays out of his bank account more than a thousand dollars, in order to do what he can to reduce a loss, caused entirely by the most fla-

grant violation by the carrier, of the rules covering the transportation and delivery of goods, the charge that he was not a purchaser in good faith, comes with a very poor grace, from the carrier.

It will be noticed that section 11 does not provide that he must be a purchaser for value, in good faith and without notice, as is provided in section 37. Nothing is said about notice in section 11. We did have notice of all that had transpired, and nevertheless paid our money for this bill of lading in the best of faith, and for the purpose of mitigating the loss. It must be remembered that by the provisions of this section a purchaser of the bill for value and in good faith can recover from the carrier:

"Whether such a purchaser acquired title to the bill before or after the delivery of the goods by the carrier, and notwithstanding delivery was made to the person entitled thereto."

This language would indicate that the fact that we knew what had happened would not prevent our recovery, if we paid value for the bill and in good faith. We submit that our act in purchasing this bill of lading was the very essence of good faith, and that we are entitled to recover by virtue of the provisions of section 11, without regard to any other provisions of the Act.

On pages 24, *et seq.*, counsel discuss the previous decisions. We have already discussed those cases and in our judgment a further and detailed answer is not necessary.

A fair sample of the logic contained in the remaining pages of counsels' brief is found in this statement on page 27:

"The Uniform Bills of Lading Act either means what we claim it does, or it means nothing."

We think counsel rather reckoned without his host in making that statement. This Court has disagreed with him in its decision in the case of *Skaw vs. Railroad*, *supra*.

We presume, however, that that fact does not detract from the correctness of his statement.

On page 31 counsel make this statement:

“The Supreme Court of Michigan, without pointing out how or why the carrier becomes liable, assumed that it was and rendered judgment against petitioner.”

Counsel make various other statements derogatory to the opinion of the Michigan Supreme Court. The reading of the opinion of the Court shows that these charges are absolutely unfounded. The gist of the Court's decision is found upon page 113 of the record. After referring to the definition of the word “holder” as defined by section 43 of the Act, the Court said:

“That definition clearly did not fit Bindner who had no right of property nor interest in the bill, nor control of it or right of possession beyond its safe keeping for Kelsey, which accommodation trust he executed by ‘chucking’ it with other papers into a drawer and handing it back when called for, in the meantime, however, on his ‘own hook’ without instructions from anyone telling Smith, who neither saw nor asked for the order, that he had it, with the results before detailed. But eliminating him as a ‘holder’ under the strict statutory definition, it may be conceded that nevertheless under subdivision (c) of section 9 he was entitled to delivery of the shipment as a person in possession of the order bill indorsed in blank by the consignee. Defendant in fact did not deliver the goods direct to him but turned them over by an irregular reconsignment to another carrier on the strength of his statement that he had the bill, without asking for it or even seeing it, in admitted violation of its own rules and of the distinct provision on the face of the order bill under which it had received the consignment, that its surrender should be required before delivery.”

We think that the decision is especially clear cut. The Court conceded that Bindner was a person in possession of the bill under subdivision (c) of section 9, and conse-

quently decided that the carrier would have been justified in having made a delivery of the car to Bindner at Louisville. The Court further held, however, that the Big Four never did make a delivery and, therefore, subdivision (c) of section 9 was no protection to the carrier, and its act having been an irregular reconsignment, which was not justified by section 9 or any other provisions of the Act, the carrier had committed a conversion of the goods.

In other words the Michigan Supreme Court held that a decision under the Federal Act was not necessary and that the case should be properly decided on common law principles, and without reference to the terms of the Act.

On page 32 counsel say:

“Through and as a direct consequence of that act, Bindner through his possession of the bill was able to obtain a delivery of the car from the Big Four and have it taken out to the camp, where it remained after rejection of the potatoes by the government under Kelsey’s contract until the potatoes became damaged through freezing in zero weather.”

The statement that the potatoes in this car were rejected by the government is absolutely untrue. We are willing to overlook the many misstatements of the law made by counsel in their brief, but we are not going to allow so flagrant a misstatement of the facts to go unchallenged. This record shows that this car was never even inspected by the government officials (R. 86), and no notice by the government was ever given to anyone that this car was rejected. On page 80 of the record Colonel Pierson gave the numbers of all of the cars that were rejected by the Quartermaster’s Department. You will look in vain for the number of this car in that list.

On page 29 counsel discuss the case of *Famous Mfg. Co. vs. Railroad*, 166 Ia. 361, decided in June, 1914. It has no bearing upon the question at issue in this case. There

was an actual delivery of the goods at the original billed destination. The goods were not sent to a distant point. That case is not authority for the act of the carrier in sending the goods to a new destination. The latter is the proposition that counsel must establish in the case at bar. The Iowa case does not help them to do that.

However, we challenge the correctness of the decision, on the point passed upon, under the law as it exists today. The gist of the decision is stated on page 369, as follows:

“The defendant’s full duty was done when it delivered the consignment under the direction of the bank as the holder of the bill of lading.”

Today a bank to which has been sent a bill of lading with draft attached, for collection, is not a holder of the bill under the provisions of “The Act”.

Section 42 gives the following definition:

“ ‘Holder’ of a bill means a person who has both actual possession of such bill and a right of property therein.”

The Iowa Bank had no right of property in the bill of lading or in the goods represented thereby, any more than did the Indianapolis bank or Kelsey or Bindner in the instant case. Rightfully or wrongfully, the Court held that the bank was a “holder” of the bill. It is not necessary to discuss the Iowa case further than to say, that that Court did not decide the case on the theory that the bank was a party in possession and neither did it decide that an irregular reconsignment was a delivery.

On page 32 counsel makes this statement:

“All of the damage sustained by the shipper in this case arose through the wrongful act of the Indianapolis bank in turning the bill over to Mr. Kelsey without requiring payment of the draft.”

In the pages following that statement counsel argue that the bank is liable and not petitioner.



As between two wrong doers the plaintiff must plant his action against the one who has committed the act that was the proximate cause of the damage. We admit that the Indianapolis bank committed a wrongful act. Because of that wrongful act the bill of lading came into Bindner's hands with instructions to hold it for Kelsey. Up until November 14th no one had been damaged particularly by the fact that Bindner had "chucked" this bill of lading in a drawer in his office. On that day Bindner requested the Big Four to send the car from Louisville to Dumesnil. The wrongful act of the Big Four in complying with this request is the one which caused the damage that we are seeking to recover in this case. That statement cannot be controverted. The Big Four committed that act knowing that it had no right to do so; knowing that it was against the rules of the company; knowing that it was a violation of the provisions of section 10 of the bill of lading itself, and further committed that act by taking a deliberate chance with goods of the value of more than \$1,000 which at that time belonged to the Grand Rapids Savings Bank. What was the proximate cause of the loss? If, as we contend, the act of the Big Four was a misdelivery or conversion, the Big Four committed the act that was the proximate cause of the injury and is liable therefor.

The Indianapolis bank got the bill of lading back in its possession. If the Big Four had accomplished this it would have been relieved of liability. It knew that it should have done this, and it knew that when it let the car go to Dumesnil without doing this, it took a chance. It does not lie in the mouth of the carrier at this time to say that the Indianapolis bank committed the entire wrong and that the carrier must be relieved of liability.

On page 32 counsel state:

"Through and as a direct consequence of that act  
(The Indianapolis bank giving the bill to Kelsey.)

Bindner through his possession of the bill was able to obtain a delivery of the car from the Big Four, etc."

It will thus be seen that counsel are basing their entire theory that the bank is liable to French & Company, instead of the carrier, on the assumption that there was a delivery to Bindner. If there was not a delivery to Bindner there is no basis for this claim. We have already stated our position on that question and feel that there is no need of repeating it, nor of further answering the argument on this point.

## CONCLUSION.

The first question to be decided is, Was there a delivery at Louisville? If there was not, that ends the case.

If there was a delivery there, the next question is, Was Bindner a party in possession of the bill? If he was not the judgment must be affirmed.

If Bindner was a party in possession and delivery was made to him, did Smith know that he was a person not lawfully entitled to the possession of the goods? If so the judgment is correct.

If all of these questions be decided against French and Company, the next question is, On and after December 7th, 1917, was French & Company a purchaser of the bill for value and in good faith? If so the judgment must be affirmed.

While a decision in favor of French & Company on any one of the propositions stated would compel an affirmation of the judgment, we believe that it should receive a favorable decision on each one, if the Court finds it necessary to go that far.

We are still of the opinion, however, that the decision of this Court should be that there was no delivery of this car at Louisville; that the case was correctly decided by the Michigan Supreme Court on common law principles; that a decision of the federal question is unnecessary and that the judgment should be affirmed.

Respectfully submitted,

CLARE J. HALL,  
Attorney for Respondent.

JOSEPH R. GILLARD,  
MYRON McLAREN,  
Of Counsel.

The following is a list of the names of the persons who have been elected to the office of Justice of the Peace for the year 1900. The names are given in alphabetical order of their surnames. The names of the persons who have been elected to the office of Justice of the Peace for the year 1900 are: [illegible text]

W. J. [illegible]  
J. [illegible]  
[illegible]  
[illegible]

OCT 31 1919  
JAMES B. HAYES

# Supreme Court of the United States

OCTOBER TERM 1919

No. 105

PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

J. F. FRENCH & COMPANY,

REPLY BRIEF FOR PETITIONER,  
PERE MARQUETTE RAILWAY COMPANY.

OSCAR E. WAER,  
JOHN C. SHIELDS,  
Of Counsel for Petitioner.

# Supreme Court of the United States

OCTOBER TERM 1919.

No. 369.

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PERE MARQUETTE RAILWAY  
COMPANY,

Petitioner,

vs.

J. F. FRENCH & COMPANY.

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## REPLY BRIEF FOR PETITIONER, PERE MARQUETTE RAILWAY COMPANY.

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In view of the unusual claims made by counsel for respondent in their brief, we deem it necessary to file a short reply brief.

### I.

*The Act Justifies Delivery to a Person in Possession of the Bill without Requiring a Surrender of the Bill.*

Counsel claim in their brief that because the Indianapolis Bank paid the Grand Rapids Bank nothing for the bill of lading, the Indianapolis Bank being a collection agent pure and simple, the bill was not "*negotiated*" to it, and it could not negotiate the bill to Kelsey and he to Bindner—in other words, that an order bill of lading

though endorsed in blank, is nothing more than a *simple contract of the common law*, possessing no element of negotiability, so that the carrier must, in each instance, and at its peril, ascertain whether a person presenting an order bill of lading is the lawful owner not only of the bill, but also of the shipment which it covers.

If counsel's contention were correct, there would be little or no reason for the passage of a Uniform Bills of Lading Act, because there would be no such thing as bills of lading negotiable by endorsement and delivery. If counsel's contention were true, there would have been no basis for the statement made by his Honor, the Chief Justice, in the case of *United States vs. Ferger*, decided in June, 1918, to this effect:

"That as instrumentalities of interstate commerce, bills of lading are the efficient means of credit resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce upon which the commercial intercourse of the country, both domestic and foreign, largely depends, is a matter of common knowledge as to the course of business of which we may take judicial notice. Indeed, that such bills of lading and the faith and credit given to their genuineness and the value they represent are the producing and sustaining causes of the enormous number of transactions in domestic and foreign exchange is also so certain and well known that we may notice it without proof." (U. S. Advance Opinions, July 1, 1919.)

There can be no question, however, about this point. While the Act provides in section 29 that "*a straight bill cannot be negotiated free from existing equities*," it provides in sections 27, 28, 30, 31 and 37 that "*an order bill may be negotiated by delivery when it has been endorsed in blank*;" that "*an order bill may be negotiated by any person in possession of the same, however such possession may have been acquired*;" that a person to whom an order bill has been duly negotiated acquires thereby the

"direct obligation of the carrier to hold possession of the goods for him according to the terms of the bill as fully as if the carrier had contracted directly with him;" and that the validity of the negotiation of a bill is not impaired by the fact that such negotiation was a "breach of duty on the part of the person making the negotiation or by the fact that the owner of the bill was deprived of the possession of the same by fraud, accident, mistake, duress, loss, theft, or conversion, if the person to whom the bill was negotiated gave value therefor in good faith without notice of the breach of duty, or fraud, accident, mistake, duress, loss, theft or conversion."

Under these provisions of the statute and under sections 8, 9, 10 and 11, it is too plain for argument that while negotiation does not convey title to the transferee free from existing equities, *unless* he is a purchaser in good faith, for value and without notice, it does make such transferee a "person in possession of the bill" so that the carrier is justified in relying on such possession and making delivery to such person.

Section 30, together with sections 27, 28 and 31, makes order bills of lading negotiable by delivery, so that any person having a bill of lading endorsed in blank in his possession is a person to whom *the carrier* is justified in making delivery under section 9, *but as between himself and the shipper* or other claimant, such a person does not, of course, take title to the bill free from equities unless, as provided in section 37, he is a purchaser in good faith, for value and without notice.

In *Shaw vs. Railroad*, 101 U. S. 557, upon which counsel lays so much stress, this Court held, and held rightly, that a person who acquired the bill with knowledge that the party from whom he acquired it was not the lawful owner of it, does not take it free from equities. Section 37 of the statute lays down the same rule. But that issue is not involved in this case. This is not a suit between



Bindner and the shipper. No one claims that Bindner or Kelsey ever got title to the bill *free from equities*, or that they ever got title to the goods *as against the shipper* or any other lawful claimant. Neither was a bona fide purchaser, and neither, therefore, took the bill of lading free from equities. *Their legal rights* under the bill of lading endorsed in blank have nothing to do, however, with their *authority* in connection with its use. As far as the carrier is concerned, it need not inquire into the *title* of the person in possession of the bill. The carrier is justified, under the statute, in making delivery to the person in possession of the bill, and when it makes such delivery it is protected as against the shipper or any one else, except a person who may purchase the unsurrendered and uncanceled bill in good faith and for value.

There could, of necessity, be no such thing as a negotiable bill of lading if the rule embodied in the statute did not exist, because a carrier would have to determine at its peril in each instance whether or not a person presenting an order bill of lading was the lawful owner, not only of the bill, but also of the shipment which it covers.

The Supreme Court of Michigan seems to have been misled on this point. It stated the shipper's grievance to be "a reconsignment of the car by the terminal carrier at Louisville for further movement over another line *without authority of the assignee at the destination point.*" (R. 103.) We are at a loss to understand why the Court failed to see that the "*assignee at the destination point* was Bindner (the assignee by delivery), and it was at *his request and with his authority* that the car was turned over to the Southern Railroad at Louisville, its destination under the bill of lading.

If endorsement in blank means anything under the statute, it means that the bill after being endorsed in blank is negotiable by delivery—payable to bearer—so that the carrier is justified in delivering the car to any

one who has it in his possession, no matter how he acquired it; and if section 11 means anything, it means that failure to require surrender and cancellation of the bill makes the carrier liable only to a purchaser for value and in good faith.

Counsel refer to section 29 of the Act providing that "A bill may be transferred by the holder by delivery, accompanied with an agreement, express or implied, to transfer the title to the bill or to the goods represented thereby", and claims that under this section there can be no transfer of the bill unless there is an agreement to pass title to it, or to the goods. We cannot understand what he means by this because there was no "transfer" or attempted "transfer" of the bill in this case. "Transfer", under the statute, is expressly contradistinguished from "negotiation", and means the mere delivery of a straight bill of lading or an order bill *not endorsed*. Negotiation takes place only after *endorsement*. See sections 32, 33 and 34 of the Act. The bill in the case at bar was *endorsed in blank*, and was "negotiated", not "transferred."

That the statute makes bills of lading negotiable by endorsement and delivery so that the carrier is entitled to rely upon mere possession without inquiring into the possessor's title is too clear to admit of reasonable argument. And that the statute justifies the carrier in making delivery to a person in possession of the bill without requiring a surrender and cancellation of the bill, is equally clear.

It will be remembered that under section 8 a carrier is bound to deliver goods upon a demand made by the holder of the bill *if the holder offers in good faith to surrender the bill*, "holder" being defined by section 42 of the Act as a person having *actual possession* of such bill and a *right of property* therein; while under section 9 a

carrier is *justified*, subject to the provisions of the three following sections, in delivering the goods to one who is—

(a) A person lawfully entitled to the possession of the goods; or

(b) The consignee named in a straight bill for the goods; or

(c) *A person in possession of an order bill for the goods by the terms of which the goods are deliverable to his order; or which has been endorsed to him, or in blank by the consignee, or by the mediate or immediate endorsee of the consignee.*

The three following sections are sections 10, 11 and 12, the last having no application here. Section 10 will be hereafter discussed, and section 11 of the Act provides that:

“If a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to anyone who for value and in good faith purchases such bill.”

If this language means anything, it means what it says, and that is, that the only penalty for failure to take up and cancel the bill is liability to a bona fide purchaser.

If the language of section 11 were not sufficient in itself clearly to establish this fact, section 39 would do so. Section 39 provides:

“Where an order bill has been issued for goods, no seller’s lien or right of stoppage in transitu shall defeat the rights of any purchaser for value in good faith to whom such bill has been negotiated, whether such negotiation be prior or subsequent to the notification to the carrier who issued such bill of the seller’s claim to a lien or right of stoppage in transitu. Nor shall the carrier be *obliged* to deliver or *justified* in delivering the goods to an unpaid seller

unless such bill is first surrendered for cancellation."

Sections 8, 9 and 11 read in connection with section 39, make it as plain as language can make it, that the carrier is *justified* in making delivery to a person in possession of the bill, without requiring a surrender of the bill, but if it fails to require a surrender and cancellation of the bill, it becomes liable to a bona fide purchaser, and to no one else.

Counsel say that when the shipper finally got his bill of lading back from the bank and went to the Pere Marquette at Grand Rapids with a request that the car be reshipped from Dumesnil to Memphis, Tennessee, the Pere Marquette compelled him to surrender the old bill of lading before it would reconsign the car for him. He says if the Pere Marquette thus required the shipper to surrender the bill, then why wasn't the Big Four legally bound to require Bindner to surrender the bill when the car was delivered to the Southern at his request. The answer is self-evident. The Big Four, the Pere Marquette, and every other carrier is, of course, bound to require a surrender and cancellation of the bill *if* it wishes to avoid the possibility that the unsurrendered bill may fall into the hands of a purchaser for value and in good faith, because it would be liable to such purchaser. The failure to require a surrender of the bill cannot, however, result in any other liability, either under the statute or under any decision, state or federal, prior to its passage.

#### *Prior Decisions*

We regret the necessity of having again to point out that cases like *Perkett vs. Railway*, 175 Mich. 253, are in no way similar to the case at bar. In the Perkett case and in the other cases cited and relied upon by counsel, the carrier in each instance delivered the shipment to,

or diverted it at the request of, a person who did *not* have, and never *had had*, possession of the bill of lading, the bill *never having left the bank* and never having been in the possession of any person to whom delivery was made *in reliance upon such possession*.

## II.

### *Bindner was a Person in Possession of the Bill.*

Counsel contend that Bindner was not a person in possession of the bill because Bindner says he held the bill for Kelsey. He did not, however, tell the Big Four that he held it for Kelsey (R. 50).

And if Bindner held the bill for Kelsey, then Kelsey was the person in possession of the bill, and the Big Four in making delivery to Bindner at his and Kelsey's request made delivery to Kelsey. As a matter of fact, that is, of course, precisely what happened. Kelsey wanted the car without paying for the potatoes until after the government paid him. So he, through some arrangement with the Indianapolis bank, got the bank to give him the bill of lading without requiring payment of the draft. Kelsey then went to Dumesnil, turned the bill of lading over to Bindner, and he and Bindner got the car from the Big Four by virtue of Bindner's possession of the bill and their representations as to such possession. The Big Four thereupon delivered the car to Bindner or Kelsey, whichever you choose,—and made delivery to a person in possession of the bill of lading endorsed in blank by the consignee.

## III.

### *The Big Four Delivered the Car to Bindner.*

Counsel himself admitted in the trial court that delivery was made to Bindner when he asked a directed verdict, by saying:

"Under the undisputed evidence, the car was misdelivered by the terminal carrier, delivered to a person who was not entitled to the property" (R. 91).

He now claims that the car was not delivered to Bindner—a claim which the shipper is not in position to make because Bindner is the only one who could question a disposition *made at his request* while he had *in his possession* the endorsed bill of lading.

Delivery was in fact made to Bindner just as much as if the Big Four had delivered the car to him on a designated sidetrack. There cannot be an actual handing over of a car of potatoes as you would hand over a book, and it necessarily follows that when a person to whom the carrier is justified in making delivery, gives certain instructions as to the disposition of the car, a delivery is effected when such instructions are followed. Bindner asked the Big Four to send the car out to the camp, which could only be done by turning it over to the Southern Railroad at Louisville, and the Big Four therefore made delivery of the car to Bindner when it complied with his request and turned it over to the Southern. The fact that the Big Four turned over with the car the waybill or instructions to the train crew on which the car had moved from Benton Harbor, a connecting point, to Louisville, and that Smith changed the destination on this waybill by striking out the word "Louisville" and writing across it "Dumesnil—Southern Railroad" surely did not make it any the less a delivery to Bindner. Any disposition of the car made at the request of Bindner, the person in possession of the bill, was a delivery to Bindner and only he could question the manner of the delivery. Even if the use of the same waybill constituted a reconsignment, regular or irregular, whatever that may mean, it was a reconsignment at the request of the person in possession of the bill of lading and therefore a delivery to such person.

The destination of the car under the bill of lading was Louisville. The car arrived safely at destination in the hands of the Big Four. At destination, the Big Four delivered it to the Southern at the request of Bindner while he had in his possession the bill of lading, and delivery was therefore made at destination to a person in possession of the bill. The fact that the freight was not paid had nothing to do with the delivery. If the Big Four wanted to trust Bindner for the freight charges instead of making him pay cash, that was its outlook. And the fact that in the used waybill which was turned over to the Southern with the car the consignee was still designated as "Order J. F. French & Co.", had nothing to do with the delivery. The waybill is not a part of the shipper's contract, and neither the shipper nor the Railroad Company could rely upon it as evidence of title. When the car arrived at Louisville, the waybill showed it to be consigned to "Order J. F. French & Co.", yet J. F. French & Co., before the car left Bailey, had endorsed the bill of lading in blank and from that time on any person who held in his possession the bill of lading was, under the statute and under the law prior thereto, the "order" of J. F. French & Co. Bindner while he held the bill endorsed in blank in his possession was himself the consignee named in the waybill, viz., "Order J. F. French & Co."

Counsel calls attention to the clause of the bill of lading providing that—

"Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect and this bill of lading shall be enforceable according to its original tenor,"

and comments on it by saying that if Bindner wanted the car to go to Dumesnil, he should have gone to an agent of

the Pere Marquette and had the change endorsed on the bill itself, and that no change having been endorsed on the bill, it must be enforced according to its original tenor.

Counsel does not seem able to grasp the fact that this bill was "enforced according to its original tenor"—the car was safely transported from Bailey, Michigan, to Louisville, Kentucky, and delivered at Louisville, Kentucky, to a person in possession of the bill of lading endorsed in blank. Delivery at Louisville was complete and final because delivery was made when the Big Four, the terminal carrier, parted with the car and disposed of it as requested by the person in possession of the bill. The contract of carriage represented by the bill of lading was thereupon completed. The Big Four had nothing further to do with the handling or movement of the car. The Big Four did not take it out to Dumesnil. The Southern, to whom it had been delivered at Bindner's and Kelsey's request, took it to Dumesnil for him. As far as the Big Four was concerned, it was Bindner's car. The only thing the Big Four had to look out for was its possible liability to a person who might acquire the uncanceled and unsurrendered bill for value and without knowledge that it had already been used to effect a delivery of the car and that it was therefore of no further force and effect.

#### IV.

##### *Section 10.*

Counsel make some claim in their brief that under section 10 the Big Four had "information at the time of the delivery that it was to a person not lawfully entitled to the possession of the goods." There is no possible foundation for this statement.



Counsel stated in the trial court (R. 39):

“There is no claim here that the carrier had any notice under section 10,”

and the trial court so found (R. 91) when it said:

“It is fair to assume that had the witness, Smith, of the Big Four Railroad Company known that the witness, Bindner, the cashier of the Southern Railroad Company at Dumesnil, held the order bill of lading in question only as agent of Kelsey and not as the agent of the Southern Railroad Co., he would never have rebilled the car in question to Dumesnil and delivered it to the Southern Railroad Co. for transmission to that point. • • • Nevertheless, his (Bindner) notification to Smith that he had the bill of lading and his instructions to Smith to forward the car to Dumesnil was misleading and in its essential elements untrue so far as it led Mr. Smith to believe he had any authority to make such demand. *Smith was clearly deceived by the conduct of Bindner.*”

And the undisputed evidence is that the agent of the Big Four did not know, and neither Bindner nor anyone else told him that there was anything unusual about the bill of lading (R. 50, 59). He had no knowledge that the draft covering the car had not been paid and knew nothing about the circumstances under which the bill of lading came into Mr. Kelsey's or Mr. Bindner's hands (R. 50, 59).

There is no testimony in the record, and up to this time there has been no claim that Smith, the agent of the Big Four, had “information at the time of delivery that it was to a person not lawfully entitled to the possession of the goods.” And counsel's only claim on this point now is, that because Smith knew that the rule of the Railroad Company required a surrender of the bill of lading before delivery of the shipment, therefore he had the information contemplated by the statute. This, of course, is absurd on its face. Had Kelsey paid the draft when he

obtained the bill of lading from the bank, there would have been no question about Bindner's being "lawfully entitled to the possession of the goods", either for himself or as agent of Kelsey. Smith of the Big Four did not know that the draft had not been paid and did not, therefore, have "information at the time of delivery that it was to a person not lawfully entitled to the possession of the goods."

## V.

*The Shipper cannot claim as a Bona Fide Purchaser under Section 11.*

As previously shown, section 11 provides that if a carrier delivers goods for which an order bill had been issued, the negotiation of which would transfer the right to the possession of the goods and fails to take up and cancel the bill, such carrier shall be liable for failure to deliver the goods to any one who for value and in good faith purchases such bill.

The shipper did not make any claim by his declaration that he was a good faith purchaser for value (R. 3), and he is in no position to make such a claim. Everyone knows what a good faith purchaser for value is—he must have bought the bill in the ordinary course of trade for value and without knowledge of any infirmities in the instrument or in the title of the person from whom he purchased it—in this case without knowledge that the car had been delivered by the Big Four to the Southern at the request of Bindner and Kelsey while Bindner had possession of the bill of lading. The shipper possesses none of these qualifications.

The shipper did not purchase the bill of lading in good faith. He took the bill back from the Indianapolis bank *under protest*. We have never heard of anyone claiming to be a good faith purchaser of an instrument which he accepted under protest. And counsel admit (brief p.

43) that when the shipper took it back he had notice of all that had transpired—he knew that the bill had already been used to obtain a delivery of the car which it covered so that it was a “canceled bill” to any one who had knowledge of that fact. The shipper knew that the bank had permitted the bill of lading to pass out of its hands, and that while it was out of the bank’s hands, it had been used by Bindner to obtain a delivery of the car (R. 7-9).

And the shipper was not even a purchaser for value, as counsel well knows.

J. F. French, the shipper, himself testified:

“I made a draft on Marshall & Kelsey, put it through our bank. \* \* \* The bill of lading was sent with the draft attached to the Commercial National Bank at Indianapolis (R. 17) \* \* \* When we gave the bank the draft and the bill of lading, the bank gave us credit for the full amount of it and we delivered the papers to them” (R. 18).

After counsel for the shipper got the bill of lading back from the Indianapolis bank, the shipper in turn “detached the draft and turned it over to the bank and gave them a check for it” (R. 24).

Courts take judicial notice of general commercial usage and everyone knows that transactions such as this are not intended to, and do not, constitute a *sale* of the bill of lading to the bank, and that the bank handles the bill of lading with the draft attached for collection. Everyone knows that if the bank gives credit to the shipper on its books for the amount of the draft, it promptly charges the same amount back to the shipper when the draft is returned unpaid, and this is precisely what was done in the case at bar. The shipper’s account was apparently insufficient to cover the amount of the charge made against it on account of the unpaid draft, and he therefore gave his check to the bank for it.

There is not a word of testimony in the record to the

effect that the shipper *sold* the bill of lading to the bank in the first instance, or that the shipper *bought back* the bill after he himself got it back from the Indianapolis bank, and the shipper himself never made any such claim on the trial. If the shipper had *sold* the bill to the Grand Rapids bank, we can rest assured that he would never have borrowed trouble for himself by *buying* it back. It is absurd at this late date to claim that the shipper *bought* the bill back from the bank and gave value for it. The transaction was precisely what the shipper's counsel himself said it was in the trial court, viz.:

"The drafts for the purchase price were to be attached to order bills of lading and eventually forwarded to the Commercial National Bank of Indianapolis for collection (R. 7) \* \* \* French & Company made their shipments and took their drafts and attached them to the order bills of lading, the Grand Rapids Savings Bank forwarding the drafts and bills of lading to the Commercial Bank of Indianapolis for collection" (R. 7).

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Counsel for respondent admit at the very end of their brief (p. 47) that if the Big Four had gotten the bill of lading back, "it would have been relieved of liability." By making this admission, they, of course, concede that delivery was made to a person to whom the carrier was justified in making delivery, and that the carrier's only default consisted in a failure to require a surrender and cancellation of the bill. As this could result in no harm to any one except an innocent purchaser of the bill, who is expressly protected by section 11 of the statute and the decisions prior thereto, the shipper's only possible claim can be that he is an innocent purchaser. As already stated, it is absurd for him to claim that he is an innocent purchaser—a purchaser in good faith and for value—of his own bill of lading, reacquired by him "*under protest*

and *with knowledge* of all the facts attending *its negotiation* by the Indianapolis bank and *its subsequent use* by Bindner to get the car from the Big Four.

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Even in the absence of the Uniform Bills of Lading Act, the allowance of the shipper's claim in this case would be a travesty upon justice. The carrier delivered the goods upon the shipper's own order, to the very person clothed by him through his agent, the Indianapolis bank, with authority to receive it. That the shipper could now complain is unthinkable.

Respectfully submitted.

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